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No. _____

IN THE
SUPREME COURT OF UNITED STATES
OCTOBER TERM, 1986

STEVEN C. PARRO, et. al., DENNIS J. ACCAVALLO, et. al., CAROL A. JASINSKI, et. al., JEFFREY LYNN KLAWITER, et. al., WILLIAM P. ASKEW, et. al., JOHN L. HORTON, et. al., ROBERT L. ALLISON, et. al., MICHAEL BARGER, et. al., BRUCE BUKAUSKI, et. al., JOSEPH D. BADAMI, et. al., JOHN R. BOESE, et. al., JOHN W. MAC DONALD, et. al., CHARLES W. FAHRENBRUCH, et. al., MICHAEL FENNESSY, et. al., DAVID J. FLAIG, et. al., MIKEL H. ALPERS, et. al., JEFFREY M. RAYKOVICH, et. al., MICHAEL A. MC NULTY, et. al., JERRY D. SLAVEN, et. al., DAVID D. HICE, et. al., THOMAS M. BROCKETT, et. al., HAROLD ANDERSON, et. al., BARTON D. ALEXANDER, et. al., RONALD K. DIXON, et. al., JOHN A. KENICK, et. al., RAYMOND G. NORDBLAD, et. al., KENNETH H. BAKER, et. al., DAVID L. WHITAKER, et. al., JAMES R. BOUTON, et. al., DENNIS E. KOVACS, et. al., GERALD M. BOPRIE, et. al., DALE B. CARTER, et. al., DOUGLAS J. KEMPSKI, et. al., GARY L. GREEN, et. al., RICHARD C. CROXFORD, et. al., BARBARA E. BLANCHARD, et. al.,

Petitioners,

-vs-

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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October 1, 1986

Questions Presented

1. Whether the federal government is free to discharge some federal employees when it decides not to discharge other federal employees for the same conduct.

2. Whether the Merit Systems Protection Board is free to deny discovery to parties before it where the discovery sought is information regard- ing federal employees who were not discharged for the same conduct for which the federal employee parties were discharged.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Ciruit entered in this proceeding on June 16, 1986.

Opinion Below

The opinion of the Court of Appeals, not reported, appears in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals for the Federal Circuit was entered on June 16, 1986. A timely petition for rehearing was denied on July 11, 1986, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Constitutional and Regulatory Provisions Involved

U. S. Constitution Amendment V.

"No person shall be ... deprived of life, liberty, or property without due process of law."

5 C.F.R. §§1201.71; 1201.72 et. seq.

DISCOVERY

§1201.71 Statement of purpose.

Proceedings before the Board shall be conducted as expeditiously as possible with due regard to the rights of the parties. Discovery is designed to enable a party to obtain relevant information needed for preparation of the party's case. These regulations are intended to provide a simple method of discovery. They will be interpreted and applied so as to avoid delay and to facilitate adjudication of the case. The parties are expected to initiate and complete needed discovery with a minimum of Board intervention.

§1201.72 Explanation and scope.

(a) Explanation: Discovery is the process apart from the hearing whereby a party may obtain relevant information from another person, including a party, which has not otherwise been provided. Relevant information includes information which appears reasonably calculated to lead to the discovery of admissible

evidence. This information is obtained for the purpose of assisting the parties in preparing and presenting their cases. The Federal Rules of Civil Procedure may be used as a general guide for discovery practices in proceedings before the Board. However, the federal rules shall be deemed to be instructive rather than controlling.

(b) Scope: Any person may be examined regarding any nonprivileged matter which is relevant to the issues involved in the appeal, including the existence, description, nature, custody, condition, and location of documents or other tangible things, and the identity and location of persons having knowledge of relevant facts. Discovery requests to nonparties and nonparty federal agencies and employees are limited to information which appears directly material to the issues involved in the appeal.

(c) Methods: Discovery may be obtained by one or more of the methods provided under the Federal Rules of Civil Procedure, including: written interrogatories, depositions,

production of documents or things for inspection or copying, and requests for admission addressed to parties. Failure to deny a request for admission shall not be deemed to constitute a binding admission.

Statement of the Case

In August of 1981, the Professional Air Traffic Controllers Organization (PATCO) called an illegal strike against the Federal Aviation Administration (FAA).

Petitioners were discharged for not returning to work at their first scheduled shift after President Reagan's moratorium had ended.

Petitioners appealed their discharges to the Merit Systems Protection Board (MSPB). Their appeals were heard by administrative law judges of the MSPB. MSPB proceedings are subject to statute, regulation, and the Fifth

Amendment of the United States Constitution.

In MSPB proceedings, discovery is authorized.

Petitioners heard that certain other members of PATCO who had engaged in the illegal strike were being reinstated voluntarily by the FAA. Petitioners sought discovery concerning these reinstatements. But the FAA refused to provide it and the MSPB refused to order its production.

Petitioners filed interrogatories to the FAA requesting information of disparate treatment. These interrogatories contained the following two questions:

> 102. Identify by name, address and phone number each air traffic controller who was not working on August 3, 1981, and

> later returned to work at the same facility at which Appellant was employed. Explain the dates such air traffic controller was not working, the reasons therefor, and the dates and circumstances of his return.
>
> 119. Was any air traffic controller fired in August or September 1981 and then later returned to work? If so, state the name and details of each such incident.

The MSPB denied petitioners' motion to compel answers to these interrogatories, stating that "to the extent they seek relevant information," the information will be produced. However, this information never was produced.

Petitioners also moved for the production of the following documents pertaining to disparate treatment:

> D. Details of all adverse personnel action proposals and final decisions by the Federal Aviation Administration since January 1, 1981 to the present

and sanctions or remedy imposed.

> O. Supply copies of any and all decisions of the Federal Aviation Administration and Merit Systems Protection Board (or it predecessor) as it relates to Federal Aviation Administration employees charged with AWOL or striking from 1968 to date.

The MSPB denied this request because it was either already covered by another order, not relevant, too broad, or partially complied with.

In addition, Petitioners request that Janice Plummer, a discharged air traffic controller who was voluntarily reinstated by the FAA, be produced to testify. The MSPB decided that her testimony would be irrelevant:

> Janice Plummer
> The appellants indicate that she was a fired air traffic controller who was returned to work in a settlement agreement

with the agency. They indicate that her testimony is necessary to establish their argument of unequal protection of law. As indicated in ALJ-1(c)(g)(1) (August 16, 1982), "(t)here are many speculative reasons why the FAA may have decided to reinstate or rehire a former controller rather than contest that particular controller's appeal before the Board. As succinctly explained in ALJ-1(c)(g), the FAA's reconsidered decisions to rehire or reinstate former controllers would have no relevance to the merits of the original decisions to remove those controllers." The testimony of this witness is deemed to be irrelevant to the issues of this appeal.

In further interrogatories on the regional level, Petitioners requested the following information pertaining to disparate treatment:

> 19. Set forth in detail the names of controllers who missed the 48-hour deadline and were allowed to return to work.
>
> 62. Has the FAA considered reinstatement of any

> controllers who engaged in alleged strike activity? If so, state the controllers involved, the reasons for such review and action that might possibly be taken with respect to their potential reinstatement.

The MSPB denied interrogatory 19 as being "repetitions" and interrogatory 62 as lacking relevance.

On appeal, the Court of Appeals found no prejudice by reason of the above denials of information, documents, and witnesses. The Court wrote:

> Petitioners allege that they were denied equal protection of the law because some air traffic controllers were treated differently from the manner in which petitioners were treated. While petitioners argue that similarly situated individuals may not be accorded different treatment by their employer, they do not point to any evidence in the record to show that any of them is similarly situated to any individual who was treated differently

> from the manner in which petitioners were treated. In any event, "[a]n agency need not exercise its discretion identically in every case. 'A penalty that is within the authority of the agency is not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases.'" Villela v. Department of Air Force, 727 F.2d 1574, 1577 (Fed. Cir. 1984) (quoting Jones v. United States, 617 F.2d 233, 238 (Ct. Cl. 1980). Uneveness [sic] in the application of a penalty is not a ground for invalidating it. Schapansky v. Department of Transporation, FAA, 735 F.2d 477 (Fed. Cir. 1984).

(See full decision of the court in the Appendix).

In another PATCO case scheduled with the present case for oral argument before the Federal Circuit, the Court wrote: "The parties stipulated that '[t]he FAA nationwide has reinstated some air traffic controllers/appellants

who were removed for participation in the [air traffic controllers] strike pursuant to settlement agreement.'" Bergh et al v. Department of Transportation, FAA, Fed. Cir (July 2, 1986).

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS WHICH RECOGNIZE THE CONSTITUTIONAL RIGHT OF PUBLIC EMPLOYEES, AND OTHERS SUBJECT TO PUNISHMENT TO DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW.

Public employees are entitled to due process and equal protection of law under the United States Constitution. The petitioners were federal employees. They are protected by the due process clause of the Fifth Amend-

ment of the United States Constitution. The Fifth Amendment also provides for equal protection of the law.

Under the Constitution, public employees are to be disciplined similarly for identical conduct and are entitled to fair hearing procedures when they have been disciplined. Two leading cases are Ciechon v. City of Chicago, 686 F.2d 511 (7th Cir. 1982) and Zeigler v. Jackson, 638 F.2d 776 (5th Cir. 1981). Both cases held that the disparate treatment of public employees for similar conduct was unconstitutional. In the present case, the petitioners claim disparate treatment for similar conduct.

In Ciechon, two paramedics were involved in a situation resulting in the

death of a person they were called to assist. One paramedic was discharged and the other was not discharged. The court of appeals found that the disparate treatment accorded the discharged employee was unconstitutional, and reversed the discharge. As to due process, the court of appeals explained:

> Due process of law fundamentally requires a fair proceeding. Boddie v. Connecticut, 401 U.S. 371, 375, 91 S.Ct. 780, 784, 28 L.Ed.2d 113; In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942; Wong Yang Sung v. McGrath, 339 U.S. 33, 49-50, 70 S.Ct. 445, 453-454, 94 L.Ed. 616. Fairness is insured by procedural safeguards which require proper notice and an opportunity to be heard. See, e.g., Goldberg v. Kelly, 397 U.S. 254, 267-68, 90 S.Ct. 1011, 1020, 25 L.Ed.2d 287. Fairness also dictates that the procedure itself not be abused or misused. No matter how complete the panoply of

> procedural devices which protect a particular liberty or property interest, due process also requires that those procedures be neutrally applied. Wong Yang Sung v. McGrath, 339 U.S. 33, 50, 70 S.Ct. 445, 454, 94 L.Ed. 616; see In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942; Hurtado v. California, 110 U.S. 516, 536-37, 4 S.Ct. 111, 121, 28 L.Ed.2d 232. Even if the procedures themselves are legitimate, it is impermissible to employ those procedures vindictively or maliciously so as to deny a particular individual due process. See Blackledge v.Perry; 417 U.S. 21, 25-28, 94 S.Ct. 2098, 2101-2102, 40 L.Ed.2d 628; North Carolina v. Pearce, 395 U.S. 711, 723-26, 89 S.Ct. 2972, 2079-81, 23 L.Ed.2d. 656.

Id. at 517.

The court in Ciechon went on to explain that the disciplinary proceedings also were an unconstitutional denial of the equal protection of the law:

The disciplinary proceedings against Ciechon also constituted a denial of equal protection of the law because they represented an arbitrary, irrational decision to discriminate among the two paramedics, Ciechon and Ritt, who were equally responsible for the welfare of the patient on all ambulance runs. Thus two persons similarly situated, in that they experienced the same set of circumstances and were equally responsible for patient assessment and treatment, were treated absolutely differently. Ciechon was charged with failure to perform her duties and discharged, Ritt was never charged or disciplined in any fashion. Since the discrimination was intentional, the equal protection clause was violated. United States v. Falk, 479 F.2d 616, 619 (7th Cir. 1973) (en banc).

Equal protection demands at a minimum that a municipality must apply laws in a rational and nonarbitrary way. Yick Wo v. Hopkins, 118 U.S. 356, 373-74 6 S.Ct. 1064, 1073-73, 30 L.Ed. 220; French v. Heyne, 547 F.2d

994, 997 (7th Cir. 1976). This requires a showing that its application of the law "rationally furthers some legitimate, articulated state purpose and therefore does not constitute invidious discrimination." San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 17, 93 S.Ct. 1278, 1288, 36 L.Ed.2d 16; see also Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172, 92 S.Ct. 1400, 1405, 31 L.Ed. 2d 768; Dandrige v. Williams, 397 U.S. 471, 485, 90 S.Ct. 1153, 1161, 25 L.Ed.2d 491. This does not mean that error or mistake in the application of the law gives rise to an equal protection claim. Snowden v. Hughes, 321 U.S. 1, 8, 64 S.Ct. 397, 401, 88 L.Ed. 497. Rather, it protects against intentional invidious discrimination by the state against persons similarly situated. Id.

We have consistently applied these principles which are at the heart of the equal protection guarantee to protect against arbitrary government conduct. Thus in Olshock v. Village of Skokie, 541 F.2d 1254 (7th Cir.

1976), this Court found equal protection violated when policemen who engaged in a protest action were differentially disciplined. The apparent basis of distinction was that those who were represented in a personnel hearing by counsel were discharged, while those who were not represented were only suspended. Similarly, in two prisoner cases, one involving a work release program and one involving an inter-prison transfer, we found that an equal protection claim was stated where inmates asserted deliberate and arbitrary denial of hearing procedures guaranteed to all inmates. Stringer v. Rowe, 616 F.2d 993 (7th Cir. 1980); Dursa v. Rose, 579 F.2d 1365 (7th Cir. 1978), certiorari denied, 439 U.S. 1121, 99 S.Ct. 1033, 59 L.Ed.2d 82; see also Ziegler v. Jackson, 638 F.2d 776, 779 (5th Cir. 1981); Cosney v. Sonora Independent School District, 603 F.2d 522, 527 (5th Cir. 1979).

Analysis of the facts presented in this case yields clear and convincing evidence of invidious discrimination.

> Paramedics Ciechon and Ritt were equally responsible for patient assessment and treatment on all ambulance runs, including that to the Ciebien household. Yet the City chose to charge and discipline only Ciechon. This choice was not made out of error, neglect, or mistake. Rather, it was an intentional act with no rational basis for such discrimination. Ritt either deserved to be discharged as Ciechon was, or Ciechon, like Ritt, deserved to be completely vindicated of all charges. There was no possible justification for treating them differently.

Id. at 522-523.

Another major public employment case involving disparate treatment is Ziegler v. Jackson, 638 F.2d 776 (5th Cir. 1981). There, the plaintiff was a patrolman. He had been convicted of the misdemeanor of presenting a firearm and criminal provocation. He was terminated under the standards of the character

requirement for police officers which required that one "has never been convicted of a felony or misdemeanor involving either force, violence or moral turpitude." Id. at 777. The plaintiff argued that the character requirement had been applied to him unconstitutionally because other police officers who had been convicted were not terminated. The court of appeals agreed:

> The Commission has failed to offer a rational justification for the differential treatment accorded to Zeigler, who was discharged, and the three police officers who were retained. Since the other officers equally subject to the character requirement were not denied employment because of their convictions, the Commission's termination of Zeigler violated his right to equal protection of the law. See Gosney v. Sonora Independent School District, 603 F.2d 522, 527 (5th Cir. 1979); cf.

> Louis v. Supreme Court of Nevada, 490 F.Supp. 1174, 1183 (D.Nev.1980)("Where waivers of a rule are not granted with consistency and no explanation is given for the disparity of treatment, a finding of denial of equal protection may be appropriate.")
>
> * * *
>
> We stress that nothing in this opinion prevents the Commission from promulgating written guidelines defining crimes involving force or violence or delineating grounds for waivers to the character requirement. The Commission simply may not interpret the minimum standards of the Standards and Training Act in a discriminatory manner. As there are no material facts in dispute, we hold that Ziegler is entitled to judgment as a matter of law. United States Steel Corporation v. Darby, 516 F.2d 961 (5th Cir. 1975). Accordingly, we REVERSE and REMAND to the district court for proceedings consistent with this opinion.

Id. at 779-80.

Another pertinent case is Brandon v. District of Columbia Bd. of Parole, 734 F.2d 56 (DC Cir.1984). There, the Court of Appeals for the District of Columbia reversed and remanded the dismissal of a complaint alleging disparate treatment in parole proceedings. The plaintiff, a prisoner twice convicted of violent crimes, alleged that he was being required to serve longer, without parole, than other prisoners. The court of appeals reasoned:

> A prisoner need not always allege the presence of a suspect classification or the infringement of a fundamental right in order to state a claim under the equal protection component of the Fifth Amendment. Even in the absence of a fundamental right or a suspect classification, equal protection requires that a classifica-

tion between similarly situated individuals bear some rational relationship to a legitimate state purpose. Schweiker v. Wilson, 450 U.S. 221, 230, 101 S.Ct. 1074, 1080, 67 L.Ed.2d 186 (1981).

* * *

The situation thus described is much the same as that in Durso v. Rowe, 579 F.2d 1365 (7th Cir. 1978). There a prisoner alleged that prison officials had violated equal protection by revoking his work-release status without affording him the same kind of hearing allegedly given to other participants in the program. In reversing the district court's dismissal for failure to state a claim, the Seventh Circuit first noted that a §1983 complaint, as is Brandon's complaint, need not identify with particularized facts the class of which he is allegedly a part; instead that task is to be left to discovery or to resolution on a Rule 12(e) motion for a more definite statement. The Seventh Circuit then went on to hold: "The defendants may be able to establish the

rationality of treating plaintiff differently. But a court ought not dismiss an equal protection claim on the basis of reasons unrevealed to the court. The state must come forward and identify the legitimate state interest being furthered." Id. at 1372 (citations omitted). Accord Ciecon v. City of Chicago, 686, F.2d 511, 523-24 (7th Cir. 1982) (employee discharge); Williams v. Taylor, 677 F.2d 510, 516-17 (5th CXir. 1982) (disenfranchisement); Ziegler v. Jackson, 638 F.2d 776 (5th Cir. 1981) (discharge of police officer); Stringer v. Rowe, 616 F.2d 993, 997-98 (7th Cir. 1980) (interprison transfer); Jones v. Lane, 568 F.Supp. 1113, 1116 (N.D.Ill. 1983) (placement in prison work release program). Brandon's equal protection claim is thus potentially meritorious, and his complaint sufficiently apprised the defendants of this claim that they should have been required to prepare an answer or otherwise plead, see Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); it was error to have dismissed the

> complaint sua sponte and thereby to cut short the normal course of litigation..

734 F.2d at 60-61. [Emphasis added.]

In the present case, the Federal Circuit laconically decided, "Unevenness in the application of a penalty is not a ground for invalidating it." This ruling is completely at odds with other circuits. See e.g., Ciechon, supra (7th Cir.); Ziegler, supra (5th Cir.); Brandon (DC Cir.). Because of the Federal Circuit's exclusive jurisdiction over appeals by federal employees from the MSPB, this ruling literally makes federal employees second-class citizens, who are not entitled to the same constitutional safeguards as public employees at the state and local levels of governments. This rule undermines merit system

principles. It is broad enough to protect cronyism, favoritism, wilfulness, and caprice in disciplinary proceedings for federal employees. By extension, it would appear to insulate any other unfair action by the federal employer not strictly forbidden by express statutory, regulatory, or contractual language.

In these circumstances, a word is in order about the Federal Circuit's source of this rule. The source is Butz v. Glover Livestock Commission Co., 411 U.S. 182, 93 S.Ct. 1455, 46 L.Ed. 142 (1978). Judge Friedman, while sitting on the court of claims, applied Glover Livestock to an employment case in his opinion in Jones v. United States, 617 F.2d 233, 238 (Ct.Cl. 1980) and then

applied Jones and Glover Livestock in Villela v. Department of the Air Force, 727 F.2d 1574, 1577 (Fed. Cir. 1984) (Nies, J. dissenting).

Butz v. Glover Livestock is not an employment case. It has nothing to do with the classified federal service. It is instead a case involving the 20 day suspension of a stockyard operator for incorrect weighing and the entry of false weights in violation of the Packers and Stockyard Act, 1921, 42 Stat. 159, 7 U.S.C. §§ 208(a) and 213(a). The company argued that the suspension was improper because other companies in other cases had not always been suspended. The Supreme Court rejected this argument. After explaining the congressional purpose of

deterence in assessing suspensions under the Packers and Stockyard Act, the Court wrote: "The employment of a sanction within the authority of an administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases" [Citations omitted.] [Emphasis added.] 411 U.S. at 187, 93 S.Ct. at 1459. The Court went on to question whether in fact there had been any disparate treatment:

> Moreover, the Court of Appeals may have been in error in acting on the premise that the Secretary's practice was to impose suspensions only in cases of "intentional and flagrant conduct." The secretary's practice, rather, apparently is to employ that sanction as in his judgment best serves to deter violations and achieve the objectives of that statute. Congress plainly intended in its broad

> grant to give the Secretary that breadth of discretion. Therefore, mere unevenness in the application of the sanction does not render its application in a particular case "unwarranted in law."

411 U.S. at 187-188, 93 S.Ct. at 1459.

Here, unlike Butz, disparate punishment is involved. Here, unlike Butz, the principles of fairness embodied the Civil Service Reform Act of 1978 are involved, and not the principles of deterence of the Packers and Stockyards Act. Here, unlike Butz, the same case is involved, i.e., the PATCO strike of 1981. The Butz reasoning is inapposite; the Butz facts are wholly distinguishable; the Butz statute is different in kind, degree, and purpose from the Civil Service Reform Act. For Butz to become the lynch pin

of disparate treatment analysis for public employees, as the Federal Circuit (and its predecessor the Court of Claims) has elected to make it, is a startling misuse of stare decisis.

2. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING DISCOVERY OF DISPARATE TREATMENT IN PROCEEDINGS OF FEDERAL EMPLOYEES BEFORE THE MERIT SYSTEMS PROTECTION BOARD.

The MSPB has the authority to direct discovery in MSPB proceedings. 5 C.F.R. §1201.71 et seq. The MSPB makes a reversible error when its refusal of discovery would so prejudice a party as to deny him due process. In Bario v. Dept. of Justice, 9 M.S.P.R. 170 (1981), the MSPB affirmed the sanction of reversal of a discharge because the

discharged employee had been denied discovery in his MSPB proceeding. The MSPB explained:

> Several judicial decisions have strongly intimated that the former Civil Service Commission had the authority to order the production of documents by an agency in connection with an employee appeal. In Barnes v. Chatterton, 515 F.2d 916, 920 (3rd Cir. 1975), the court of appeals found that the "failure of the Examiner vigilantly to safeguard [appellant] Barnes' procedural rights and to secure for him documents and data necessary for his defense or for an effective cross-examination of witnesses transforms such rights into mere illusory guarantees." In Higgins v. Kelly, 475 F.2d 789, 793 (3rd Cir. 1978), the same court of appeals held that the agency's refusal to honor the appellant's request for production of documents denied him his procedural rights, and ordered that the appeal be remanded to the Commission for further proceedings.

The D.C. Circuit Court of Appeals reinforced the view that the Commission had the authority to order production of documents in McClelland v. Andrus, 606 F.2d 1278 (1979). The Commission's hearing examiner had denied the appellant's mid-hearing request that the agency produce a copy of an investigative report, finding that he had no power to subpoena it and that it need not be produced anyhow because it had not been relied on in the adverse action against the appellant. The court of appeals disagreed. It found that the Commission was "bound to ensure that its procedures meet due process requirements," and that "discovery must be granted if in the particular situation a refusal to do so would so prejudice a party as to deny him due process." Id. at 1285-86. The court concluded with an order that the employing agency turn the report over to the Commission. Id. at 1290.

In keeping with these judicial decisions, we conclude that under the pertinent statutory, regulatory,

and FPM provisions, the Commission did have the authority to order the production of documents and other evidence whenever a refusal to do so would so prejudice the appellant as to deny him or her due process of the law. In this case, the administrative law judge ordered the production of numerous documents on the basis of his finding that partial production did not meet due process requirements. We find, therefore, that the judge's order was consistent with the authority of the Commission which was devolved upon the Board and, by delegation, to the administrative law judge.

The remaining issue for resolution, then, is the propriety of the sanction imposed on the agency for failure to comply with the discover order. The authority to issue a discovery order would, of course, have little meaning without the concomitant authority to impose sanctions for failure to comply. See Fed. R. Civ. P. 37(b); 5 C.F.R. §1201.43(a) (1981). Where, as here, to proceed with a hearing on appeal

> without the requested documents would preclude the appellant from a fair opportunity to defend against the charges, the only appropriate sanction is the ultimate coercive measure of reversal.

9 M.S.P.R. at 175-176.

The discovery to which a discharged federal employee is entitled includes evidence of disparate treatment. E.g., Giesler v. Dept. of Transpr., 3 M.S.P.R. 277 (1980). There, the MSPB, in affirming the discipline of an air traffic controller, found that the FAA had provided discovery of disparate treatment:

> With regard to appellant's allegation that he was denied the right to meaningful discovery in connection with the precept of like penalties for like offenses, he stated that he requested information on penalties imposed through an interrogatory and moved for a continuance of the hearing when the FAA did not

> comply with his request. Appellant concluded that he was prejudiced by being denied information that was crucial to his case, and that without discovery in this area, he was denied the right to prepare a challenge to the action taken against him. In this connection, we note that at a prehearing conference appellant was furnished information concerning disciplinary action taken by the agency against employees who committed offenses similar to those appellant was charged with having committed. Thus, appellant was not denied information relating to the right to challenge his suspension on the basis of disparate treatment. Accordingly, there is no basis to reverse the presiding official's finding on this issue.

In the present case, the petitioners sought evidence of the disparate treatment of air traffic controllers who were not discharged for the same conduct. The FAA refused to provide this critical information, and the MSPB

refused to order it. This refusal to provide discovery was extremely prejudicial and precluded petitioners from fully developing their due process and equal protection defenses. These defenses, as explained in part 1 of this petition, are not frivolous and are grounded in federal appellate precedent.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Federal Circuit.

Respectfully submitted:

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DATED: October 3, 1986
3532a

APPENDIX

APPENDIX 1:
Opinion and Judgment of Court of Appeals

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APPENDIX 1:

Opinion and Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

STEVEN C. PARRO, et. al.,	)	85-1465 *
DENNIS J. ACCAVALLO, et. al.,	)	85-1466
CAROL A. JASINSKI, et. al.,	)	85-1467
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JOHN L. HORTON,	)	85-1470
ROBERT L. ALLISON, et. al.,	)	85-1471
MICHAEL BARGER, et. al.,	)	85-1472
BRUCE BUKAUSKI, et. al.,	)	85-1473
JOSEPH D. BADAMI, et. al.,	)	85-1474
JOHN R. BOESE, et. al.,	)	85-1518
JOHN W. MAC DONALD, et. al.,	)	85-1519
CHARLES W. FAHRENBRUCH, et. al.	)	85-1520
MICHAEL FENNESSY, et. al.,	)	85-1521
DAVID J. FLAIG, et. al.,	)	85-1522
MIKEL H. ALPERS, et. al.,	)	85-1523
JEFFREY M. RAYKOVICH, et. al.,	)	85-1524
MICHAEL A. MC NULTY,	)	85-1525
JERRY D. SLAVEN, et. al.,	)	85-1526
DAVID D. HICE, et. al.,	)	85-1527
THOMAS M. BROCKETT, et. al.,	)	85-1528
HAROLD ANDERSON, et. al.,	)	85-1529
BARTON D. ALEXANDER, et. al.,	)	85-1530
RONALD K. DIXON, et. al.,	)	85-1531
JOHN A. KENICK, et. al.,	)	85-1552
RAYMOND G. NORDBLAD, et. al.,	)	85-1553
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DAVID L. WHITAKER, et. al.,	)	85-1555
JAMES R. BOUTON, et. al.,	)	85-1556
DENNIS E. KOVACS, et. al.,	)	85-1557
GERALD M. BOPRIE, et. al.,	)	85-1558
DALE B. CARTER, et. al.,	)	85-1559
DOUGLAS J. KEMPSKI, et. al.,	)	85-1560
GARY L. GREEN,	)	85-1561
RICHARD C. CROXFORD, et. al.,	)	85-1562
BARBARA E. BLANCHARD, et. al.,	)	85-1563
	)	
Petitioners,	)	
-vs-	)	
	)	
DEPARTMENT OF TRANSPORTATION	)	
FEDERAL AVIATION ADMINISTRATION,	)	
	)	
Respondent.	)	

* All petitioners and their respective MSPB Docket Numbers are listed on Appendix A.

DECIDED: June 16, 1986

Before FRIEDMAN, Circuit Judge, BENNETT, Senior Circuit Judge and BISSELL, Circuit Judge.

BISSEL, Circuit Judge

DECISION

The decisions of the Merit Systems Protection Board (Board), affirming the removal by the Federal Aviation Administration, Department of Transportation (FAA), of William T. Kuhar, Docket No: CH075281F2127, and of Harry Bartholomew, Docket No. CH075281F0959 are vacated and remanded. The appeal of Dean C. Clark, Docket No. CH075281F1221 is transferred to the United States Claims Court. The decisions of the Board

affirming the remaining two hundred and thirty petitioners' removal by the FAA is affirmed.

OPINION

Counsel's request for oral argument was granted on the issues set forth in Contentions 11 and 12 below. Notwithstanding the request of counsel for oral argument on the remaining general contentions and on the separate contentions of certain petitioners, we have determined on the basis of the request and the briefs that oral argument will not be necessary because the dispositive issues have been authoritatively decided, the facts and legal argument are adequately presented in the briefs and record, and the decisional process would not be aided by oral argument. Fed. R. App. P. 34(a).

Petitioners seek review of thirty-five (35) final decisions of the Board sustaining the decision of the Federal Aviation Administration (FAA) to remove them from their positions as air traffic controllers based upon their participation in a strike against the United States and their absence from their positions without leave.

Petitioners' counsel filed a single initial brief and a single supplemental brief raising twelve contentions as to why the removal actions against all the petitioners--two hundred and thirty three (233) in total--should be reversed or remanded in addition, thirty-two (32) petitioners** raise arguments specific to the removal action. We shall first address

** The petitioners with specific appeals are listed on Appendix B.

the general contentions raised as to all petitioners and then the specific arguments applicable to a single named petitioner.

General Contentions

Contention 1. The Board committed a reversible error of law in failing to decide an interlocutory appeal which had been certified by the presiding official. This contention is without merit. The interlocutory appeal became moot once the decisions of the presiding officials were rendered and were appealed directly to this court without seeking the Board's review of the presiding officials' decisions.

Contention 2. The presiding officials erred in denying witnesses sought by the petitioners on the safety issue. Without addressing whether the petitioners have the right to subpoena the President of

the United States and other high level government officlas to discuss safety issues, the petitioners have failed to establish that the Board's failure to allow such testimony was harmful error. The record does not disclose what information was believed to be peculiarly within the knowledge of the listed government officials, nor does it disclose any attempt to establish that the information was unavilable from other sources. Most importantly, since an allegation of hazardous working conditions has been held by the Board to be an affirmative defense (see Haymore v. Department of the Navy, SE075281F0098 (MSPB Jan. 12, 1983); Parker v. Department of the Interior, 4 MSPB 184 (1980), for such testimony to be in any way relevant, a petitioner would have had to

establish a prima facie case that the sole reason for his absence was that by reporting for any duty he would have been placed in reasonable fear of physical, mental or emotional harm. No petitionr has pointed to any evidence in the record which would have supported a finding that he made such a prima facie case.

Contention3. The Board erred in denying the petitioners' right to call or examine witnesses in national discovery. Since the presiding official is granted wide discretion in the management of discovery in an appeal to the Board (see 5 C.F.R. §1201.75), we find no reversible error in the Board's orders of May 12, 1982, June 10, 1982, July 22, 1982 and August 17, 1982 nor in its failure on September 20, 1982 to order the acceptance

and recognition of petitioenrs as participants in national discovery due to their failure to give timely notice. Pet.App. 160-167, 176-181, 183.

Contention 4. The presiding officials erred in denying each petitioenr's objection to consolidate of appeals. Under 5 U.S.C. §7701(f) presiding officials have the discretion to consolidate appeals. Having shown to this court no specific grounds upon which a claim of prejudice as to a particular petitioner could be based nor having set forth a showing whereby the presiding officials abused their discretion, we hold that the presiding officials did not err in denying the objections to the consolidation of appeals. Dorrance v. Department of Transportation, FAA, 735 F.2d 516 (Fed. Cir. 1984).

Contention 5. The FAA erred in reinstating air traffic controllers who were on strike and who did not return to work by the beginning of their deadline shifts while refusing to reinstate any of the petitioners. Petitioners allege that they were denied equal protection of the law because some air traffic controllers were treated differently from the manner in which petitioners were treated. While petitioners argue that similarly situated individuals may not be accorded different treatment by their employer, they do not point to any evidence in the record to show that any of them is similarly situated to any individual who was treated differently from the manner in which petitioenrs were treated. In any event, "[a]n agency need not exercise its discretion identically in

every case. 'A penalty that is within the authority of the agency is not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases'." Villela v. Department of tne Air Force, 727 F.2d 1574, 1577 (Fed. Cir. 1984) (quoting Jones v. United States, 617 F.2d 233, 238 (Ct. Cl. 1980)). Uneveness in the application of a penalty is not a ground for invalidating it. Schapansky v. Department of Transportation, FAA, 735 F.2d 477 (Fed. Cir. 1984).

Contention 6. The FAA erred in failing to notify all air traffic controllers of the deadline shift rule. This contention was definitively rejected by this court in Adams v. Department of Transportation, FAA, 735 F.2d 488, 491 (Fed. Cir. 1984).

Contention 7. The presiding officials and the Board should have been disqualified from hearing the cases of petitioners. Petitioners' mere assertion that they were treated unfairly by the Board and its presiding officials does not overcome the well settled legal principle that such officials are presumed to have acted in good faith. See McCarley v. Merit Systems Protection Board, 757 F.2d 278, 280-81 (Fed. Cir. 1985).

Contention 8. Because of the FAA's ex parte communications to the FAA's deciding officials, petitioners' discharges were unconstitutional and the Board decisions were erroneous as a matter of law. Petitionrs' contention that the FAA erred in supplying its supervisory personnel with written guidance (General

Notices) as to how to handle personnel matters which arose out of the strike is without merit. General Notices are a matter of public record, the ones at issue here gave general guidance to managers, were not mandates and stressed that each deciding official was to use his best judgment in deciding whether to remove an individual air traffic controller. E.g., GENOT 141, Pet. App. 102-05. Therefore, the General Notices do not constitute improper ex parte communications under this court's holdings in Welcker v. United States, 752 F.2d 1577, 1582-83 (Fed. Cir. 1985); Campbell v. Department of Transportation, FAA, 735 F.2d 497, 500-501 (Fed. Cir. 1984); Sullivan v. Department of the Navy, 720 F.2d 1266 (Fed. Cir. 1983).

Contention 9. The Board erred in ignoring various factual determinations in district courts concerning the duration of the PATCO strike. In Adams v. Department of Transportation, FAA, 735 F.2d 488, 493-94 (Fed. Cir.), cert. denied, 105 S.Ct. 432 (1984), this court rejected this contention, i.e., that the strike was ended by statements in various court decisions. Since petitioners have not shown that any event--other than certain court opinions--ended the strike prior to the dates on which they were charged with striking, this contention is without merit.

Contention 10. The Board erred in finding that the removal of petitioners would "promote the efficiency of the service" in view of the government's contention that various appellants were

subject to a Federal District Court affirmative injunction to return to work. In Johnson v. Department of Transportation, FAA, 735 F.2d 510, 515-56 (Fed. Cir. 1984), this court held that removal of an air traffic controller found to have participated in a strike against the United States promotes the efficiency of the service. Hence, this contention also is without merit.

Contention 11. The FAA made a prejudicial error in misleading petitioners about their right to seek reinstatement through arbitration. The error alleged in this case is that the "notice of appeal rights" (Notice) from the FAA's removal decision mailed to each air traffic controller was defective in that it contained a warning that their right to

file grievances under the applicable collective bargaining agreement could be affected by the decertification of PATCO. The language at issue in the Notice is as follows:

> If, on the other hand, you believe this action ciolated article 69 and you choose to file a grievance, you must submit a written grievance to Mr. Dale Leider, Chief, Air Traffic Control Tower, Traverse City, Michigan no later than 15 calendar days after the effective date of the removal.
>
> In this connection you should know that the FAA has filed an unfair labor practice (ULP) charge against PATCO for its role in the strike and

is seeking to have the union decertified. The case is now being processed by the authority and a determination that PATCO committed an ULP could impact on the processing of grievances under the PATCO/FAA agreement. If the union is decertified, and the agreement terminatd, this avenue of appeal may not be availzable to you. If you elect to file a grievance, it must be filed in accordance with article 7, section 8 of the agreement and submitted on FAA Form 3770.2. The grievance will be processed beginning with step two of the grievance procedure in the agreement. Pet.App. 110-111, Appeal No. 1465 (emphasis added).

Petitioners argue that the Notice was prejudically misleading in that it discourgaged petitioners from resorting to arbitration by incorrectly suggesting that arbitration would become unavailable if PATCO were decertified.

Petitioners' contention is based upon their assertions that arbitration, in fact, would have been available to petitioners notwithstanding the subsequent decertification of PATCO, citing United States Gypsum Co. v. United Steelworkers, 384 F.2d 38 (5th Cir.1967[)]; Local 368 United Fed. of Eng. v. Western Electric Co., 359 F. Supp. 651 (D.N.J. 1973).

The agency counters with the argument that by statute only the union and the agency may invoke arbitration, 5 U.S.C. §7121(b)(3)(C), and that when a union has

been found to have committed an unfair labor practice, the Federal Labor Relations Authority must "revoke the exclusive recognition status of the labor organization, which shall then immediately cease to be legally entitled and obligated to represent employees in the unit . . . ." 5 U.S.C. §7120(f). Therefore, after the decertification of PATCO, arbitration, in fact, became unavailable under the terms of the collective bargaining agreement and the governing law.

The issue before us is not whether arbitration in fact was available to petitioners, but whether the Notice to petitioners was prejudically misleading. As the law on availability of arbitration to an employee once the union has been decertified is unsettled both in the

private sector and in the public sector, the Notice to petitioners is as accurate a statement as to their appeal rights as could have been made under the circumstances. There existed no error much less a prejudicial one.

The Notice merely advised employees that the decertification of PATCO "could impact on the processing of grievances" and that "this avenue of appeal may not be available to you.' GENOT 147, Pet. App. 111. These were not incorrect statements and fulfill any possible duty of FAA to provide petitioners sufficient informaiion so that the "choice between two alternatives"--here the appeal routes--is "understood by the employee and that such a decision be freely made." Covington v. Department of Health and Human Services, 750 F.2d 937, 943 (Fed. Cir. 1984).

Further, the petitioners would have to show "that a reasonable person would have been misled by the agency's statements" under "an objective test . . . applicable to situations involving misrepresentation . . . . Applying this test, the court will neither inquire into the subjective perceptions of the employee . . . nor the subjective intentions of the agency." Scharf v. Department of the Air Force, 710 F.2d 1572, 1575 (Fed. Cir. 1983).

In this case it is clear that the statements contained in the Notice would not have misled a reasonable man under an objective test nor is there any evidence of record that petitioners in good faith relied on this advice to their detriment.

Contention 12. The personnel action taken against petitioners is void ab initio by reason of the FAA's misstatements about arbitration. The petitioners argue that the FAA committed error, the mere commission of which under the holding of our predecessor court in Athos v. United States, 597 F.2d 722 (Ct. Cl. 1979), is harmful per se and mandates a reversal of petitioners removals. Since we have found no error, this contention necessarily fails.

Individual Petitioners

Each of the following petitioners was allegedly improperly discharged by the FAA based upon the individual record of his appeal to the Board. Each petitioner asked this court to order his reinstatement or to remand his appeal to the Board for further proceedings.

A. Appeal No. 85-1469

1. John C. Neece, Dockt No: CH075281F2480. The presiding official found that the petitioner participated in the strike on August 3-5, 1981. "[T]he grace period granted by the President did not relieve controllers of all obligations to their employer during the grace period." Anderson v. Department of Transportation, FAA, 735 F.2d 537, 540 (Fed. Cir.), cert. denied, 105 S.Ct. 432 (1984). The presiding official addressed petitioner's contention that he was denied an opportunity to report to work by his deadline shift by virtue of his receipt of his letter of proposed removal prior to the start of the shift. The presiding official found petitioner's "argument that he would have reported, absent receipt of the

notice, to be unpersuasive" and that petitioner had "failed to rebut the agency's prima facie case of participating in the strike." Pet. App. 27, Appeal No. 85-1469.

The decision of the presiding official is supported by substantial evidence. Since the petitioner failed entirely to communicate with the agency, the presiding official was entitled to draw the adverse inference from his silence that he never intended to report to work. Campbell v. Department of Transportation, FAA, 735 F.2d 497, 502 (Fed. Cir.), cert. denied, 105 S.Ct. 247 (1984).

2. Robert J. Tibble, Docket No: CH075281F3121. Petitioner's contention that his absence from work was due to an illness rather than participation in the

strike is legally unavailing. "[T]o refute the government's prima facie case of strike participation . . . the employee must show by objective evidence that he was incapable of performing and duties during the period for which he was supposed to be at work because of the medications he was taking." Triola v. Department of Transportation, FAA, 769 F.2d 760, 762 (Fed. Cir. 1985) (emphasis added). Petitioner "admitted that he probably could have been placed on administrative duties." Pet. App. 37, Appeal No. 85-1469. Therefore, there is substantial evidence in the record to support the presiding official's finding that petitioner had "failed to rebut the agency's prima facie case of his participation in the strike." Pet. App. 38. Appeal No. 85-1469.

3. Larry E. Van Valkenburg, Docket No. CH075281F3172. Petitioner's contention that his failure to report for his deadline shift was not due to strike participation, but rather, that his failure to report for duty was attributable to confusion regarding the date the presidential moratorium expired, is legally unavailing. See Adams v. Department of Transportation, FAA, 735 F.2d 488 (Fed. Cir.), cert. denied, 105 S.Ct. 432 (1984); Dorrance v. Department of Transportation, FAA, 735 F.2d 516 (Fed. Cir.), cert. denied, 105 S.Ct. 432 (1984); Anderson v. Department of Transportation, FAA, 735 F.2d 537 (Fed. Cir.), cert. denied, 105 S.Ct. 432 (1984). The presiding official's finding that the petitioner had "failed to rebut the agency's prima facie case" is supported by

substantial evidence. Pet. App. 39, Appeal No. 85-1469.

4. Harold F. Pierce, Jr., Docket No. CH075281F2636. Petitioner contends that the presiding official erred in not ordering his reinstatement on the grounds that the FAA committed narmful procedural error in not timely providing him with an appeal packet. We find no error in the presiding official's denial of petitioner's motion for dismissal on this ground as the error, if any, was harmless. The record shows that the appeal packet was delivered to petitioner's original representative. Pet. App. 71, Appeal No. 85-1469. Although petitioner's subsequent counsel did not receive the appeal packet until just prior to the nearing, counsel was offered an extension which was refused.

Pet. App. 88, Appeal No. 85-1469. Although some pages were missing from the packet, the presiding official struck from the record the missing pages, Pet. App. 81, and petitioner has not shown specifically how he was harmed. Under this court's holding in Dorrance v. Department of Transportation, FAA, 735 F.2d 516, 520 (Fed. Cir.), cert. denied, 105 S.Ct. 432 (1984) "[t]o be 'harmful error' necessitating our reversal of the Board, the error must substantially impair an employee's rights." On appeal to this court, petitioner has demonstrated no such harm to his rights.

5. Gary L. Wilder, Docket No. CH075281F3278. Petitioner's contention that his failure to report for his deadline shift was not due to strike participation,

but rather, that his failure to report for duty was attributable to confusion regarding the date the presidential moratorium expired is legally unavailing. See Adams v. Department of Transportation, FAA, 735 F.2d 488 (Fed. Cir.), cert. denied, 105 S.Ct. 432 (1984); Dorrance v. Department of Transporation, FAA, 735 F.2d 516 (Fed. Cir.), cert. denied, 105 S.Ct. 432 (1984); Anderson v. Department of Transportation, FAA, 735 F.2d 537 (Fed. Cir.), cert. denied, 105 S.Ct. 432 (1984). Petitioner's further contention that the conditions at the Oshkosh facility were so dangerous that he feared of being placed in physical, emotional or mental harm if he reported to work also fails as an affirmative defense to the government's prima facie case of strike participation.

"[T]o refute the government's prima facie case of strike participation based upon the employee's 'unauthorized absence during a strike of general knowledge' (Schapansky, 735 F.2d at 482), the employee must show by objective evidence that he was incapable of performing any duties during the period for which he was supposed to be at work . . ." Triola v. Department of Transportation, FAA 769 F.2d 760, 762 (Fed. Cir. 1985) (emphasis added). The presiding official's finding that the petitioner had "failed to rebut the agency's prima facie case" of participation in the strike is supported by substantial evidence. Pet. App. 41, Appeal No. 85-1469.

6. Tod R. Lanham, Docket No. CH075281F2167. Petioner's contentions that the conditions at the Oshkosh facility were

so dangerous that he feared of being placed in physical, emotional or mental harm if he reported to work fails as an affirmative defense to the goernment's prima facie case of strike participation. "[T]o refute the government's prima facie case of strike participation based upon the employee's 'unauthorized absence during a strike of general knowledge' (Schapansky, 735 F.2d at 482), the employee must show by objective evidence that he was incapable of performing and duties during the period for which he was supposed to be at work . . . ." Triola v. Department of Transportation, FAA, 769 F.2d 760, 762 (Fed. Cir. 1985) (emphasis added). The presiding official's finding that the petitioner has "failed to rebut the agency's prima facie case of participation in the strike" is supported

by substantial evidence. Pet. App. 23, Appeal No. 85-1469.

B. Appeal No. 1471

1. William T. Kuhar, Docket No. CH075281F2127. The issue in this appeal is whether the presiding official erred as a matter of law in sustaining petitioner's removal for being absent without leave (AWOL) for one day without taking into account any mitigating factors.

In taking official notice that a nationwide air traffic controller strike took place between August 3rd and August 6, 1981, the presiding official stated:

> The Board discussed at length in Ketchem v. Department of Transportation, Federal Aviation Administration, MSPB Docket No. DA075281F0713 (May 28, 1982), the

propriety of officially noticing the commencement and duration of the Professional Air Traffic Controllers Organization (PATCO) strike. It concluded by taking official notice that an unlawful strike of air traffic controllers occurred from August 3, through August 6, 1981. Id. at 9. The Board additionally noted, Id. at 6, that the continuance of the strike beyond August 6, 1981 is subject to substantial dispute, and it is not an appropriate fact to be officially noticed as a matter of common knowledge under 5 C.F.R Section 1201.67. The Board stated further at 9 that the agency bears the burden of proving by direct evidence

that a strike was in progess subsequent to August 6, 1981 and that the employee could have returned to work on that date.

Pet. App. 2, Appeal No. 85-1471.

Petitioner was charged with striking and being AWOL on August 5, 6 and 7, 1981. At the hearing it was determined that petitioner had uncancelled regular days off on August 5 and 6, 1981. As to the striking charge for August 7, 1981, the presiding official found:

> The appellant argues that evidunce has not been produced to show that the srike lasted beyond August 6, 1981. Such evidence has not been produced by the agency. As indicated above, I took official notice that the natiodwide PATCO

strike took place between August 3 to August 6, 1981. Since evidence of striking past August 6, 1981, has not been furnished, I find the striking charge not sustained.

As pertains to the AWOL charge, I find that Mr. Kuhar has not provided any satisfactory explanation for his not appearing fo work on August 7, 1981 . . . . Therefore, I find tht the AWOL charge is sustained by a preponderance of the evidence.

As far as the penalty for the sustained charge of AWOL, I will use the same rationale as used above . . . where I found that even a first offense of AWOL can be grounds for

removal where it disrupts the efficiency of the service. See Desiderio [v. Department of the Navy, 4 MSPB 171 (1980)]. In the instant case, Mr. Cherry testified that because the air traffic controllers did not show up for their regularly assigned shifts, he was forced to curtail operation hours at the Cuyahoga Tower because of lack of controllers to do the job. Thus, I conclude that removal for this single sustained offense is appropriate.

Pet. App. 13, Appeal No. 1471.

In Douglas v. Veterans Administraion, 5 M.S.P.R. 280 (1980), the Board recognized a number of factors that are relevant for consideration in

determining the appropriateness of a penalty. "[S]ome of the pertinent factors will weigh in the [petitioner's] favor while others may not or may even constitute aggravating circumstances." Douglas, 5 M.S.P.R. at 306. The key is a "responsible balancing of the relevant factors" in each case. Douglas, 5 M.S.P.R. at 306.

This court stated in VanFossen v. Department of Housing and Urban Development, 748 F.2d 1579, 1581 (Fed. Cir. 1984):

> In determinging an appropriate penalty the Board is not required to articulate irrelevant factors, Nagel v. Department of Health and Human Services, 707 F.2d 1384, 1386 (Fed. Cir. 1983), but failure to consider a significant mitigating factor

constitutes an abuse of discretion. Cf. Miguel v. Department of the Army, 727 F.2d 1081, 1083-84 (Fed. Cir. 1984).

In this case, the presiding official did not consider the relevant factors, but mrely considered the first Douglas factor, that is "[t]he nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional . . ." Douglas, M.S.P.R. at 305. Other factors were relevant, such as the petitioner's past work record, his past disciplinary record, the effect of the offense upon his ability to perform at a satisfactory level. Douglas, 5 M.S.P.R. at 305. The penalty of removal in this case is "an abuse of

discretion which failed responsibly to balance all of the relevant factors." Miguel, 727 F.2d at 1086. The final decision of the Board sustaining petitioner's removal is vacated and the case is remanded. On remand the Board will consider and balance the relevant Douglas factors in determining an appropriate penalty for the sustained charge of AWOL.

2. Harry Bartholomew, Docket No. CH075281F0959. The issue in this appeal is whether the presiding official erred as a matter of law in sustaining petitioner's removal for being absent without leave (AWOL) for one day without taking into account any mitigating factors.

The final decision of the Board sustaining petitioner's removal is contained in a presiding official's opinion

which decided 110 separate appeals, including the appeal of William T. Kuhar, Docket No. CH075281F2127. The same issue is presented in this case as was presented in Mr. Kuhar's appeal to this court, found at pages 15-18 of this opinion. Hence the findings of the presiding offical in Mr. Kuhar's decision are equally applicable to the petitioner's appeal as is this court's analysis of the issue.

Petitioner was charged with striking and being AWOL on August 14, 1981. He was on uncancelled annual leave between August 3 through 13, 1981. The presiding official found:

> As I have found the agency has failed to prove that the strike continued after August 6, I cannot sustain the strike charge lodged against the appellant . . . .
>
> . . . .

As I found above, the normal agency penalty under these circumstances is insufficient as the appellant was AWOL on a day when the agency's need for him was arguably acute. Mr. Friar testified that the strike caused the implementation of revised shift schedules, including putting superivsors and staff specialists in control positions and placing some "flow control restrictions on airplanes." Mr. Friar explaied that under these restrictions, the number of scheduled flights into and out of the airport was reduced. Mr. Friar stated that the terminal radar service area was eliminated along with elimination of the separation

service for the visual flight rule concerning general aviation aircraft. Mr. Friar stated that the remaining 23 controllers and supervisors and staff specialists began working a six-day work week. Further, appellant's absence on the day in question remains unexplained to this day. It is clear that AWOL may be grounds for removal as by its very nature it disrupts the efficiency of the service. Desiderio [v. Department of the Navy, 4 MSPB 171 (1980)]. In conclude that removal for this single sustained offense is appropriate.

Pet. App. 11, Appeal No. 85-1471.

In this case, the presiding official

did not consider the relevant factors, but merely considered the first Douglas factor, that is, "[t]he nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional . . ." Douglas, 5 MS.P.R. at 305. Other factors were relevant, such as the petitioner's past work record, his past disciplinary record, the effect of the offense upon his ability to perform at a satisfactory level. Douglas, 5 M.S.P.R. at 305. The penalty of removal in this case is "an abuse of discretion which failed responsibly to blance all of the relevant factors," Miguel v. Department of the Army, 727 F.2d 1086. The final decision of the Board sustaining petitioner's removal is facated and the

case is remanded. On remand the Board will consider and balance the relevant Douglas factors in determining an appropriate penalty.

3. Charles Baymiller, Docket No. CH075281F0968. Petitioner's contention that as a matter of law his approved leave for the week of August 3, 1981, could only have been cancelled in the event of an operational emergency and that the August 3 strike was not imminent in June of 1981 when his leave was cancelled fails. In Letenyei v. Department of Transportation, FAA, 735 F.2d 528, 531 (Fed. Cir. 1984) this court adopted the Board's decision in McPartland v. Department of Transportation, No. DA075281F1018 (MSPB Feb. 8, 1983), which held that the collective bargaining agreement "requires only the existence or

reasonable likelihood of the existence of an operational emergency before steps may be taken to cancel approved leave prospectively or actually to cancel such leave during the duration of the emergency." The court further stated that: "[t]he threat of an imminent national strike by the air traffic controllers fully justified, indeed required, the agency to cancel Letenyei's leave so that he would be available to work during the strike." Letenyei v. Department of Transportation, FAA, 735 F.2d at 531. Petitioner's assertion that the strike was not "imminent" in June, when the first official strike vote was taken, assumes that the agency had twenty-twenty-hindsight, depends upon too narrow a definition of the word imminent and ignores the fact that, in

reality, a strike by PATCO was reasonably expected all summer long.

4. Ronald Young, Docket No. CH075281F3336. Petitioner's contention that his failure to report for his deadline shift was not due to strike participation, but rather that his failure to report for duty was attributable to his reporting instead for military duty is refuted by substantial evidence in the record. Petitioner was charged with strike participation and absence without leave on August 3, 4 and 5, 1981. Petitioner's deadline shift began at 11:00 p.m. on August 5, 1981. He reported for his military duty at 5:30 a.m. on August 6, 1981. Pet. App. 146, Appeal No. 85-1471. The presiding official's finding that petitioner "was not on any approved leave

and has not rebutted the agency's prima facie case when he failed to report for duty from August 3 through 5, 1981" is supported by substantial evidence.

5. Craig Ausse, Docket No. CH075281F9121. Petitioner's contention that his absence from work was due to illness in his family rather than participation in the strike is refuted by substantial evidence in the record. See Anderson v. Department of Transportation, FAA, 735 F.2d 537 (Fed. Cir.), cert. denied, 105 S.Ct. 432 (1984).

6. Glenn H. Roderick, Docket No. CH075281F2775. Petitioner's contentions that his absence from work was due to his wife's illness and to his confusion over his deadline shift is not only refuted by substantial evidence in the record, (see

Anderson v. Department of Transportation, FAA, 735 F.2d 537 (Fed. Cir.), cert. denied, 105 S.Ct. 432 (1984), but is legally unavailing. See Cecil v. Department of Transportation, FAA, 767 F.2d 892 (Fed. Cir. 1985). Petitioner's further contention that the presiding official impermissibly transferred the burden of proving strike participation from the agency to petitioner to disprove strike participation fails under Schapansky v. Department of Trnasportation, FAA, 735 F.2d 477 (Fed. Cir.), cert. denied, 105 S.Ct. 432 (1984). Although petitioner argues that his absence for his deadline shift was not "unexplained" in that he attempted to call the facility prior to his shift to request sick leave, the presiding official found that the petitioner "did not even

contact the agency concerning a request for sick leave." Pet. App. 16, Appeal No. 1471. The decision is supported by substantial evidence. See Griessenauer v. Department of Energy, 754 F.2d 361 (Fed. Cir. 1985) (determination of witness credibility within discretion of presiding official).

7. Richard Fagan, Dockete No. CH075281F1493. Petitioner's contention that (1) his absence from work was not due to strike participation, but rather, was due to his being on approved annual leave and (2) the presiding official impermissibly shifted the burden of proving strike participation from the agency to petitioner to prove nonstrike participation, is not only refuted by substantial evidence in the record, see

Griessenauer v. Department of Energy, 754 F.2d 361 (Fed. Cir. 1985) (determination of witness credibility within discretion of presiding official), but is also legally unavailing. See Schapansky v. Department of Transportation, FAA, 735 F.2d 477 (Fed. Cir.), cert. denied, 105 S.Ct. 432 (1984).

8. Robert F. Lang, Docket No. CH075281F2162. Petitioner's contention that his failure to report for work during the first week of August 1981, was not due to strike participation, but rather, that he was on authorized leave of absence is refuted by substantial evidence in the record. See Griessenauer v. Department of Energy, 754 F2d 361 (Fed. Cir. 1985) (determiniation of witness credibility within discretion of presiding official).

9. Gregory Rauch, Docket No. CH075281F2698. Petitioner's contention that his absence from work was due to an illness rather than participation in the strike is legally unavailing. "[T]o refute the government's prima facie case of strike participation . . . the employee must show by objective evidence that he was incapable of performing any duties during the period for which he was supposed to be at work because of the medications he was taking." Triola v. Department of Transportation, FAA, 769 F.2d 760, 762 (Fed.Cir. 1985) (emphasis added). The presiding official found that "his physician indicated that he was capable of performing his duties on 'straight days'." Pet. App. 22, Appeal No. 85-1471. Therefore, there is substantial evidence in the record to support the

presiding official's finding that petitioner had "failed to rebut the agency's prima facie showing that he was acting in concert with others to withhold services." Pet. App. 23, Appeal No. 85-1471.

10. Richard Herring, Docket No. CH075281F1829. Petitioner's contention that his failure to report for his deadline shift was not due to strike participation, but rather, that his failure to report for duty was attributable to coercion, is legally unavailing. Johnson v. Department of Transportation, FAA, 735 F.2d 510 (Fed. Cir. 1984). Petitioner raises three contentions before this court which were not raised before the Board. They are as follows: (1) his deadline shift for returning to duty was not August 5, 1981, as charged, but August 8, 1981; (2) an

impermissible ex parte communication took place; and (3) a constructive suspension occurred entitling him to pay for the period beginning August 6, 1981 until the effective date of his discharge. Claims or arguments which could have been raised before the presiding official, but were not, may not be raised on appeal to this court. Synan v. Merit Systems Protection Board, 765 F.2d 1099, 1101 (Fed.Cir. 1985); Lizut v. Department of the Army, 717 F.2d 1391, 1396 (Fed.Cir. 1983).

There is substantial evidence to support the presiding official's finding that petitioner "has not rebutted the agency's prima facie case of his participation in the strike, and the charges against him are sustained by a preponderance of the evidence." Pet. App. 24, Appeal No. 85-1471.

11. James F. Thomas, Docket No. CH075281F3371. Petitioner's contention that his failure to report for his deadline shift was not due to strike participation, but rather, that his previously authorized administrative leave for the period August 7 through August 11, 1981, was not cancelled is refuted by substantial evidence in the record. Hayes v. Department of the Navy, 727 F.2d 1535, 1537 (Fed. Cir. 1984) (hearsay is admissible at administrative hearings and may constitute substantial evidence).

12. Thomas J. Mahoney, Docket No. CH075281F2274. Petitioner's contention that his failure to report for duty from August 3 through August 6, 1981, was not due to strike participation, but rather, that his previously approved annual leave

was not cancelled is refuted by substantial evidence in the record. See Hayes, 727 F.2d, 1535, 1537 (Fed.Cir. 1984) (hearsay is admissible at administrative hearings and may constitute substantial evidence).

C. Appeal No. 85-1474

1. Frank P. Zaremba, Docket No. CH075281F3341. Petitioner's contention that he cannot be removed for strike participation because he had the last deadline shift at his facility is legally unavailing. See Crosley v. Department of Transportation, FAA, 17 M.S.P.R. 486, 488 (1983)(a single employee continuing to withhold his service can be on strike if his action is part of a concerted effort with others to win concessions from his employer).

2. James R. Pauley, Docket No. CH075281F2592. Petitioner's contention that his failure to report for his deadline shift was not due to strike participation, but rather, that his faiure to report for duty was attributable to confusion concerning his employment status during the presidential moratorium, is legally unavailing. See Adams v. Department of Transportation, FAA, 735 F.2d 488 (Fed.Cir.), cert. denied, 105 S.Ct. 432 (1984); Dorrance v. Department of Transportation, FAA, 735 F.2d 516 (Fed. Cir.), cert. denied, 105 S.Ct. 432 (1984); Anderson v. Department of Transportation, FAA, 735 F.2d 537 (Fed.Cir.), cert. denied, 105 S.Ct. 432 (1984). The presiding official's finding that the petitioner had "not rebutted the prima facie case" is

supported by substantial evidence. Pet. App. 81, Appeal Nos. 85-1523, et. al.

3. Dean C. Clark, Docket No. CH075281F1221. Petitioner is not appealing his removal action, but, rather, requests this ciurt to make an award to him of back pay. He alleges that the record is unrebutted that he worked on August 1, 2 and 3 and had a regular day off on August 4, 1981, and that he was not paid for any of these days. The presiding official made no finding as to this.

Pay disputes are not matters within the jurisdiction of the Board under 5 U.S.C. §7701 and this court under 5 U.S.C. §7703 and 28 §U.S.C. §1295 lacks jurisdiction to entertain petitioner's request by way of review of a Board decision. Pursuant to 28 U.S.C. §1631, the

matter is transferred to the United States Claims Court for consideration under the Tucker Act, 28 U.S.C. §1491.

4. Larry S. Gerovac, Docket No. CH075281F1629. Petitioner contends that under this court's holding in Schapansky v. Department of Transportation, FAA, 735 F.2d 477, 482 (Fed. Cir.), cert. denied, 105 S.Ct. 432 (1984), "little countering evidence would be required where, for example, the prima facie case was minimally supported." He contends that since there was no showing that petitioner withheld his services in concern with anyone else, the findings of the presiding official that "[i]t was his impression that crossing the picket line might trigger violence" and that eh "attempted to call the facility several times but was unsuccessful," Pet.App. 79, Appeals Nos. 85-1523, et al.,

were sufficient to rebut the agency's minimally supported prima facie case of strike participation. Petitioner alleges that the worst that can be said of him is that he made a good faith error in judgment in unilaterally deciding not to attempt to pierce the picket line and return to work.

Petitioner's argument fails. Once the presiding official found that a prima facie case of strike participation had ben estabIsihed, the presiding official properly applied the standard for coercion approved by this court in Johnson v. Department of Transportation, FAA, 735 F.2d 510 (Fed.Cir. 1984). The presiding official found that "a person of ordinary firmness would have reported to work in these circumstances." Pet. App. 79, No. 85-1523, et al. There is substantial

evidence in the record to support the presiding official's finding that petitionr had "failed to rebut the agency's prima facie case." Pet.App. 80, Appeal Nos. 85-1523, et al.

D. Appeal No. 85-1518

James A. Klugiewicz, Docket No. CH075281F2078. Petitioner's contention that his failure to report for his deadline shift on August 6, 1981, was not due to strike participation, but rather, that his previously authorized annual leave for the prriod August 6 through August 8, 1981, was cancelled without his knowledge and that he was ill with the flue on August 6, 1981, is not only refuted by substantial evidence in the reocrd, see Griessenauer v. Department of Energy, 754 F.2d 361 (Fed.Cir. 1985) (determination of witness credibility

within discretion of presiding official), but is also legally unavailing. See Triola v. Department of Transportation, FAA, 769 F.2d 760, 762 (Fed.Cir. 1985).

E. Appeal No. 85-1519

Charles L. Reinke, Docket No. NY075281F1170. Petitioner contends that the presiding official's decision contains two important findings of fact which are unsupported by substantial evidence as follows: (1) "it is undisputed that he satisfactorily performed the full range of his duties between July 20 and August 3" and (2) that he was observed picketing "during the week of August 3." Pet. App. 31, Appeal Nos. 85-1523, et al. Even if these two findings of fact are disregarded, there remains substantial evidence to establish petitioner's strike participation

and his failure to rebut the government's prima facie case.

Petitioner further contends that he did not report for work on August 3 and August 6 because his emotional condition at the time disabled him from performing his duties. The presiding official found that "[w]hen appellant did not report for duty on August 3 he did not call the facility to explain his situation or request sick leave . . . He offered no corroborative evidence concerning his mental state or condition on August 3 and did not claim to have been treated by a physician the week of August 3." Pet. App. 31, Appeal Nos. 85-1523, et al. The presiding official's finding that petitioner failed to establish his disability, thus failing to rebut the aency's prima facie case, is supported by

substantial evidence. As this court held in Triola v. Department of Transportation, FAA, 769 F.2d 760, 762 (Fed. Cir. 1985) (emphasis added), "the employee must show by objective evidence that he was incapable of performing any duties during the period for which he was supposed to be at work . . ." due to his disability.

F. Appeal No. 1522

1. Paul F. Marazita, Jr., Docket No. CH075281F2292. Petitioner's contention that his faiulre to report for his deadline shift was not due to strike participation, but rather, that his failure to report for duty was attributable to his actual confusion regarding his deadline shift which confusion was justified and aggravated by family problems is not only refuted by substantial evidence in the

record, see Griessenauer v. Department of Energy, 754 F2d 361 (Fed.Cir. 1985)(determination of witness credibility within discretion of presiding official), but is also legally unavailing. See)Anderson v. Department of Transportation, FAA, 735 F.2d 537 (Fed. Cir), cert. denied, 105 S.Ct. 432 (1984).

2. Jopseph E. Forys, Docket No. CH075281F1568. Petitioner's contention that he cannot be removed for strike participation because he had the last deadline shift at his facility is legally unavailing. See Crosley v. Department of Transportation, FAA 17 M.S.P.R. 486, 488 (1983) (a single employee continuing to withhold his services can be on strike if his action is part of a concerted effort with others to win concessions from his employer).

G. Appeal No. 85-1523

James D. Smith, Docket No. CH075281F2968. Although petitioner's contention that the agency failed to prove that it had properly cancelled his annual leave which was scheduled to begin on the day of his deadline shift is correct, this contention is legally unavailing to mandate a reversal of his removal action. Petitioner does not question the presiding official's finding that he participated in the strike on August 3, 4 and 5, 1981. Since petitioner did not explain these absences and did not attempt to report for duty at any time, or even testify at the hearing before the presiding official, the presiding official properly sustained the strike participation charge for the first three days of the strike. As this court

held in Anderson v. Department of Transportation, FAA, 735 F.2d 537 (Fed. Cir.), cert. denied, 105 S.Ct. 432 (1984):

> Contrary to petitioners' argument, the grace period granted by the President did not relive controllers of all obligations to their employer during the grace period. Thus, petitioners' premise that the controllers were fired only for their failure to report for their deadline shift, and not for their conduct prior thereto, is false.

Id. at 540 (emphasis added).

H. Appeal No. 85-1525

Michael A. McNulty, Docket No. CH075281F2364. Petitioner's contention that his absence frm work was due to an illness rather than participation in the strike is legally unavailing. "[T]o refute the government's prima facie case of strike participation . . . the employee must show by objective evidence that he was incapable of performing any duties during the period

of which he was supposed to be at work because of the medications he was taking." Triola v. Department of Transportion, FAA, 769 F.2d 760, 762 (Fed. Cir. 1985) (emphasis added). The Board's findings that petitioner's "failure to notify the agency of his illness precluded his assignment to other administrative duties" and that petitioner's "admission of strike participation, as well as the other evidence of record" established that petitionr's "absence from duty during the period charged was by strike participation and not by physical incapacity" are supported by substantial evidence. Pet. App. 15, Appeal Nos. 85-1528 and 1525.

I. Appeal No. 85-1528

1. Thomas M. Brocket, Docket No. CH075281F1085. Petitioner's contention

that, bsed upon the facts found by the presiding official, it cannot be concluded that the petitioner withheld his services in concert with others, is not only refuted by substantial evidence in the record (see Griessenauer v. Department of Energy, 754 F.2d 3ö1 (Fed. Cir. 1985) (determination of witness credibility within discretion of presiding official), but is also legally unavailing. See Schapansky v. Department of Transportation, FAA, 735 F2d 477 (Fed.Cir.), cert. denied, 105 S.Ct. 432 (1984).

2. Thomas F. Burkman, Docket No. CH075281F1137. Petitioner's contention that, based upon the facts found by the presiding official, it cannot be concluded that the petitioner withheld his services in concert with others, is not only refuted

by substantial evidencein the record (see Griessenauer v. Department of Energy, 754 F2d 361 (Fed.Cir. 1985) (determination of witness credibility within discretion of presiding official), but is also legally unavailing. See Schapansky v. Department of Transportation, FAA, 735 F.2d 477 (Fed.Cir.), cert. denied, 105 S.Ct. 432 (1984).

J. Appeal No. 85-1559 Brenda Schroer, Docket No. CH075281F2879. Petitioner's contenteion that she cannot be removed for strike participation because she had the last deadline shift at her facility is legally unavailing. See Crosley v. Department of Transportation, FAA, 17 M.S.P.R. 486, 488 (1983) (a single employee continuing to withhold his services can be on strike if

his action is part of a concerted effort with others to win concessions from his employer).

K. Appeal No. 85-1560

Noah Taylor, Docket No. CH075281F3086. Petitioner's contenteion that his failure to report for his deadline shift was not due to strike participation, but rather, that the cancellation of his annual leave by a temporary supervisor was a nullity resulting in petitioner being removed for being absent from work during an uncancelled leave of absence, is refuted by substantial evidence in the record. See Griessenauer v. Department of Energy, 754 F.2d 361 (Fed. Cir. 1985)(determination of witness credibility within discretion of presiding official).

CONCLUSION

With the exception of the decisions of the presiding official in the appeals of William T. Kuhar, Docket No. CH075281F2127 and Harry Bartholomew, Docket No. CH075281F0959 which we vacate and remand and the appeal of Dean C. Clark, Docket No. CH075281F1221 which we transfer to the United States Claims Court, the remaining two hundred and thirty (230) decisions we affirm on the basis of the presiding officials' opinions because the Board's final decisions were not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, were not obtained without procedures required by law, rule or regulation having been followed, and were supported by substantial evidence. 5 U.S.C. §7703(c) (1982); see

Hayes v. Department of the Navy, 727 F.2d 1535, 1537 (Fed. Cir. 1984).

We deny respondent's request in certain of these appeals that sanctions be imposed against petitioners and their counsel for a frivolous appeal. We are satisfied that, while such appeals are without merit, a good-faith effort was made to distinguish such cases from the precedents against them.

3533a

APPENDIX 2:

Denial of Rehearing of Court of Appeals

CORRECTED

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

STEVEN C. PARRO, ET. AL.)	Appeal Nos. 85-1465, 85-1466, 85-1467, 85-1468, 85-1469, 85-1470, 85-1471, 85-1472, 85-1473, 85-1474, 85-1518, 85-1519, 85-1520, 85-1521, 85-1522, 86-1523, 85-1524, 85-1525, 85-1526, 85-1527, 85-1528, 85-1529, 85-1530, 85-1531, 85-1552, 85-1553, 85-1554, 85-1555, 85-1556, 85-1557, 85-1558, 85-1559, 85-1560, 85-1562, 85-1563, 85-1561
Petitioners,	
v.	
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION	

Before FRIEDMAN, Circuit Judge, BENNETT, Senior Circuit Judge, and BISSELL, Circuit Judge.

ORDER

A petition for rehearing having been filed in this case by petitioenrs,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

FOR THE COURT

/s/

Francis X. Gindhart,
Clerk

Dated: 7/11/86

cc: Mr. Steven Z. Cohen
Ms. Sandra P. Spooner, DOJ

APPENDIX 3:

Interrogatories to the Agency

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO FILED OFFICE

In the Matter of:

JOSEPH D. BADAMI
Cahicago ARTCC

Appellant,

vs

DEPARTMENT OF TRANSPORATION,
FEDERAL AVIATION ADMINISTRAITON,

Agency

_____/

INTERROGATORIES TO THE AGENCY

NOW COMES the above-named Appellant, by and through his attorneys, COOPER & COHEN by STEVEN Z. COHEN, Pursuant to 5 U.S. Code 1205(b)(2)(2)(B) and 5 C.P.R. 1201.72, requests the Agency to answer the following Interrogatories, separately and in writing, under oath, within twenty (20) days of receipt thereof. (All Interrogatories are continuing in nature).

1. State the name, job position, grade and rank of the agency official answering these interrogatories on behalf of the agency.

2. List the names, addresses, job classification and telephone numbers of all personnel specialists and/or functionaries who took part in the processing of the adverse action against the Appellant, Further, state the specific function performed by each individual listed.

3. Identify the organization chain of command (by name, address, phone number and position) involved in the processing of the adverse action against the Appellant.

4. a. Who made the decision to take adverse personnel action against the Appellant?

b. What other individuals, if any, had input into said decision?

5. What various adverse actions were available to be taken against the Appellant based upon the allegations made? (State each and every element of proof necessary to ascertain each and every adverse personnel action that may have been taken against the Appellant).

6. Please supply statements made by any party or agent of a party to this action and any witness or potential witness in this action which concerns this case.

7. Was the decision to take adverse action against this Appellant made before or after the statements made by the President of the United States with regard to the deadline for reporting for work?

8. What equipment has been considered by your Agency which would assit the Air Traffic Controllers in identifying air

traffic or distances between vehicles or location of vehicles, or potenteial collision circumstances, or improving identification of vehicles?

9. List the names, addresses, job classification and telephone numbers of all personnel specialists and/or functionaries who took part in the processing of the adverse action against the Appellant. Further, state the specific function performed by each individual listed.

10. Did the Agency send a directive to the Appellant officially cancelling annual leave?

11. Has the Agency advised the United States Attorney not to take criminal action? If so, when, by whom, and what is the substance of that request?

12. a. How many air Traffic

Controllers in Appellant's region retired after full service?

b. How many Air Traffic Controllers stopped working on medical disability?

c. What were the medical conditions and diagnoses for each?

d. What were the names of each?

13. Who made decisions regarding extensions of time and requests for documents raised at the oral presentation?

14. Who is the safety director of the Agency at Appellant's installation? State his/her name, address, telephone number, and job classification.

15. Was the decision official informed of the results of each oral presentation by the hearing official? If so, state the time, date and length of such meetings and

provide a brief synopsis of the statements or comments made with regard to Appellant's claim.

16. a. Where is the personnel file of the Appellant kept?

b. Who has access to the personnel file of the Appellant?

c. If the personnel file of the Appellant is kept in Chicago, please indicate the method by which such files are signed out, who has the authority to sign them out, who has the authority to receive the files and what notice is provided to the individual that his file is being viewed.

d. Are the use and control of personnel files governed by any provisions of the negotisted agreement between the Agency and the Professional Air Traffic

Controller Organization in force at the time of the alleged job action. If so, state each such provision.

e. Will the Agency use any parts of the Appellant's personnel file as evidence before the Merit Systems Protection Board? If so, what parts or documents from that file will be introduced into evidence?

17. What training did these individual hearing officers have in preparation for their role as a hearing officer? If any training was provided these individuals by the Agency, please state by whom given and further state with specificity the nature of such instruction and/or training.

18. a. Were any favorable decisions (i.e. dismissals of prposed adverse action against an Air Traffic Controller) granted

by an Oral Presentation Hearing Officer in the Chicago region of the Agency in August or September, 1981?

b. If so, for each, state who the hearing officer was, the date of the hearing, and the reasons for dismissal of the charges.

19. Identify with specificity each and every regulation which directs and/or compels an oral hearing prior to taking an adverse action.

20. State the method and procedures used to pick the hearing officers for any oral presentations conducted pursuant to an adverse personnel action.

21. What are the Agnecy's rules and regulations concerning notification of absences? Please provide a copy of such rules and/or regulations. If such rules

and/or regulations are different as between different facilties of the Agency, please provide a copy of such rules and/or regulations for each facility of the Agency.

22. How have regulations governing the job of Air Traffic Controllers changed before and after the processing of said adverse action against the Appellant?

23. How are the individuals who served as hearing officers in such oral presentations paid?

24. Identify the individual and/or individuals responsible for choosing the hearing officer for oral hearings in this matter.

25. Please state each and every action or activity of each and every phase of the Federal Aviation Administration's contingency plan for potential strikes and

other job action by Air Traffic Controllers.

26. Please state when, where and by whom each action or activity referred to in Question 25 was performed, and when, and by whom each was ordered.

27. Were the haring officers employed in te Appellant's case regular employees of the Agency? If so, were these individuals detailed from other positions? If so, what positions were they detailed from and for what period of time was the detail for?

28. State the name, address and telephone number of each witness you intend to call and the substance of that witness' testimony.

29. List all evidence, including records and testimony, by which the Agency will support its allegation against the Appellant.

30. Has the Agency considered requesting the United State Attorney to take criminal action against the Appellant or any Air Traffic Controller? If so, what action was considered, is propised, has been or will be taken?

31. Please identify with specificity each and every writing in the Agency's files regarding Air Traffic Controller's job safety, health and work conditions.

32. Were any requests made to change the work conditions for Air Traffic Controllers within the last five (5) years? If so, state the nature of each request, by whom made and when made.

33. List each exhibit to be produced at trial and attach copies to your answers to these interrogatories.

34. State with specificity each and

every program to control stress for the Air Traffic Controllers implemented or suggested or considered or recommended by the Agency.

35. Identify and attach all documents, not otherwise supplied, including regulations, by which the Agency will attempt to support its adverse action against the Appellant.

36. a. Were remedies less than removal considered by the Agency? If so, what other remedies were considered?

b. Why were those remedies rejected?

37. Where any dismissals of the charges prepared at the same time as the Notices of Removal?

38. Has the Agency ever taken an adverse perseonnel action as against any

Air Traffic Controller for absence without leave in the last fifteen (15) years? If so, please provide the Appellant with a complete list of all cases wherein any such adverse action was either proposed or taken; a complete record of the action proposed and/or taken; and the procedures used in taking that action. (Of course, any such records should be sanitized as to name).

39. How do you define the terms "participates" and "strike" for the purpose of use by the Agency in administrative and personnel matters?

40. Has the Agency ever taken an adverse personnel action as against any Air Traffic Controller for participation in a strike in the last fifteen (15) years? If so, please provide Appellant with a

complete list of all cases wherein any such adverse action was either proposed or taken; a complete record of the action proposed and/or taken; and the procedures used in taking that action. (Of course, any such records should be sanitized as to name).

41. Were the hearing officers advised by other Agency personnel as to the conduct of their duties? If so, please state by whom advised, when such advice was given and what the substance of such advice was.

42. When did the President of the United States announce his decision to fire the Air Traffic Controllers? Was the statement made after consultation with an individual? If so, state the name, address and telephone number of each such individual and the nature of that consultation.

43. Was the immediate supervisor of the Appellant consulted before adverse action was proposed? If so, state the date, time and place where the supervisor was consulted. State by whom the supervisor was consulted. State the name, address, telephone number and job classification of the supervisor of the Appellant.

44. Was the Agency ever informed that operation of the system in the fashion previous to August 3, 1981 was in any way detrimental to the mental or physical health of the Air Traffic Controllers? If so, state the name, address and telephone number of each such source or informant. Also, state the substance of each such information.

45. Did the Agency send a directive the Appellant officially cancelling days off?

46. If Appellant had worked on his day off would such scheduling have violated Agency regulations regarding break time between shifts?

47. Please provide any notes, memoranda, and/or directives concerning the negotiations between the Agency and any labor organizations representing Air Traffic Controllers beginning with January, 1981 and continuing until the present.

48. Identify the individuals within the Agency who served as superiors to the hearing officers.

49. Identify the organizational chain of command (by name, address, phone number and position) involved in the processing of the adverse action against the Appellant.

50. What various adverse actions were available to be taken against the Appellant based upon the allegations made? (State each and every element of proof nedessary to ascertain each and every adverse personnel action that may have been taken against the Appellant).

51. a. Who made the deicison to take adverse personnel action against the Appellant?

b. What other individuals, if any, had input into said decision?

52. a. Was the stenographer employed at the oral hearing an FAA employee?

b. Was the stenographer a notary public?

c. Was the stenographer sworn for the purposes of presenting an accurate, factual and complete account of the oral presentation?

d. Were any witnesses sworn?

e. Was the heaeing officer sworn?

f. Were any specific instructions given to the stenographer identifying areas that should or should not be recorded in her memoranda?

g. Please identify the name, address, telephone number and job classification of the stenographer that was employed at the oral presentation of the Appellant.

53. Are there any documents and/or guidelines and/or regulations which outline the duties of a hearing officer in a situation as outlined above? If so, please attach copies of such regulations and/or documents to your answers to these interrogatories.

54. If any questions arose at the oral presentation, who were such questions referred to? State the name and job position of each individual to whom these questions were referred.

55. a. When were notices of proposed removals sent to the Appellant?

b. Please specify the method by which the Agency determined that their notices were received by their employees?

56. a. Who made the administrative decision to reduce the notice time period from thirty days to seven days?

b. What was the basis for the decision to reduce the time period in the case of the Appellant?

c. What facts were relied on to reduce the time period in the case of the Appellant?

57. List each and every criteria used in evaluating which individual to use as a hearing officer for such oral hearings.

58. As relates to "Notice of Proposed Removal", answer the following:

a. Were the notices of proposed removal preprinted?

b. On what date were these documents preprinted?

c. At whose direction were these documents preparinted?

d. On what what date were these documents delivered to the FAA and its subordinate units?

e. If the printing was done by a government printing office, please identify and provide a copy of all other forms or requisitions supplied to prompt the printing of such documents?

f. Please identify the names and addresses and job positions of all clerical staff who participated in the typing of the adverse action proposals distributed to Air Traffic Controllers subject to adverse personnel action.

g. Were any memos received and/or sent between FAA representatives or functionaries directing and/or setting up a timetable for the production and/or distribution of the notices of proposed removal?

59. Has the Agency consulted witn the United States Attorney's office with regard to possible criminal action against the Appellant? If so, what was the substance of their communications?

60. As relates to "Notice of Removal", answer the following:

a. Were the notices of removal preprinted?

b. On what date were these documents preprinted?

c. At whose direction were these documents preprinted?

d. Onwhat date were these documents delivered to the FAA and its subordinate units?

e. If the printing was done by a government printing office, please identify and provide a copy of all other forms or requisitions supplied to prompt the printing of such documents?

f. Please identify the names and addresses and job positions of all clerical staff who participated in the typing of the adverse action proposals distributed to Air Traffic Controllers subject to adverse personnel action.

g. Were any memos received and/or sent between FAA representatives or functionaries directing and/or setting up a timetable for the production and/or distribution of the notices of proposed removal?

61. a. When was the form for the proposed removal printed?

b. When was it typed and by whom?

c. Will you voluntarily attach the memo requesing such forms printing and typing?

62. Please state the names of each and every air traffic controller who did work on August 3, or 4 or 5 or 6 or 7 AND is presently employed by the FAA as an air traffic controller or in some other capacity. For each such employee, please state why he was not at work on any of

those dates and the date upon which he did return to work and the circumstances of such return.

63. Please state with specificity eacn and every complaint, incident of of misconduct, prejudice, anti-union bias and any other negative factor known to involve the hearing and deciding officials.

64. a. Did the Agency or any individual within the Agency (employee, agent, etc.), or any facility under the jurisdiction, contact Appellant, either orally or in writing, from August 1, 1981 to present?

b. If your answer to the aforesaid Interrogatory is in the affirmative, please attach copies of all such correspondence to the Appellant either directly or indirectly related to these

proceedings, or, in the case of oral communications, please describe the content of said oral communications.

65. If the Agency issued or caused to be delivered or delivered a telegram or other communication to the Appellant on or about August 3, 1981, informing the Appellant that "an illegal strike was in progress", or words to that effect, please answer the following:

a. Who sent the aforesaid telegraph or coimmunication?

b. On whose authority was said telegram or communication sent?

c. as said telegram received by the Appellant? If so, please attach proof of service.

66. On what day and date was the Appellant notified of the Agency's decision

to terminate his employment (Intent to terminate (7-day) letter)? Please attach a copy of the communication notifying the Appellant of the Agency's decision to intend to terminate his or her employment pending reply, if said communication is not already attached hereto.

67. a. Was the Appellant ever accused of committing a criminal or illegal act?

b. If the answer to the above question is in the affirmative, what specific criminal act (citing statute) was the Appellant ever accused of violating?

68. Who or what was the accusing authority? By way of clarification, how was it determined that the Appellant committed an illegal act or a criminal act and who or what entity made this determination?

69. Was said alleged criminal violation, if any, ever certified to the Justice Departent, United States of America, for prosecution?

70. a. Was the Appellant ever arrested, arraigned, indicted or convicted of the aforesaid criminal acts or illegal acts which are referenced herein.

b. If the answer to the aforesaid question is in the negative, please explain why said action was not taken.

71. Please list the exact dates and hours during which the Appellant was allegedly absent from employment during duty hours.

72. a. Please specifically set forth the date and hour after which the Appellant could not return to his or her employment facility for the purpose of continuing his

or her professional duties as an air-traffic conroller and state the reason or reasons therefor.

b. If the answer to the foregoing Interrogatory is a date and time prior to the date and time upon which tne Appellant was formally terminated from employment, please state the reason or reasons that the Appellant was denied the ability to return to his or her employment for a normally scheduled duty assignment.

73. On what date and time was the Appellant effectively locked out or prohibited from entering his or her working facility?

74. Which individual or individuals or entity set a time limit for the return to employment of controllers who were absent? What time deadline was establisned?

75. Upon what or pursuant to whose authority was said time deadline established?

76. In what situations and upon what or whose authority was said time deadline established?

77. a. In the case of this Appellant, was an annual leave, sick leave or other excused absence from employment duty status revoked or terminated, or shortened, due to the alleged strike activity?

b. If the answer to the above Interrogatory is in the affirmative, how was notice of revocation , shortning, or termination of leave status or authorized absence status conveyed to the Appellant? Please attach evidence showing receipt of such notice by the Appellant if such notice was conveyed in writing.

c. Please recite, list, or attach hereto, applicable provisions of the PATCO bargaining agreement nad/or contract establishing leave or authorized absence from employment regulations and please state whether or not such provisions between PATCO and the Agency in such agreement or contract were violated if said leave or excused absence were revoked, shortened or terminated.

78. a. Did the Appellant request an extension of time during which to respond to the Agency's decision to terminate nis or her employment?

b. If the answer to the above Interrogatory is in the affirmative, what was the Agency's response to said request for extension of time to answer and, if denied, please state the reasons given therefor.

79. If the Appellant replied to the Agency's decision to terminate his or her employment in writing, please attach a copy of this writing and then state the reason or reasons for which the Agency's initial decision to terminate was sustained.

80. Were all of Appellant's questions at the oral hearing answered by the Agency to the best of its knoweldge and belief, and in good faith?

81. a. Did the Appellant ever make a request for production of documents including personnel file and/or documents discoverable pursuant to the Freedom of Information Act in connection with the proceedings against him or her?

b. If the answer to the above Interrogatory is in the affirmative, were said documents provided to the Appellant?

c. If the answer to the above Interrogatory is in the negative, please state the reason that said document or documents or related tangible evidence so requested was not provided to the Appellant.

d. Assuming that the Appellant made a request pursuant to the Freedom of Information Act to receive certain documents or evidence, and further assuming that the Agency declined this request unless the Appellant paid an amount of money in excess of $9,000.00, purportedly for the duplication of over 100,000 documents, please describe or explain in narrative form the contents of said 100,000 plus documents or information contained therein which the Agency refused to provide except upon the payment of said sum of money.

82. Was disciplinary action, formal reprimand, or suspension ever imposed upon the Appellant by the Agency prior to the case at bar? If the answer to this question is in the affirmative, please explain, reciting dates, actions taken and reasons therefor.

83. a. Did the Appellant ever request or, if known to the Agency, make an attempt to return to employment subsequent to August 3, 1981?

b. If the answer to the above Interrogatory is in the affirmative, please state the nature of Appellant's request, the date said request(s) was made, and the response thereto by the Agency or any employee or agent thereof.

84. Please attach hereto all Unsafe Condition Reports (U.C.R.'s) relevant to or

filed at the facility at which the Appellant was employed on August 3, 1981 between 1978 and present.

85. Please state whether or not duress or coercion on the part of any person, organization or on the part of the Federal Aviation Administration in contributing to the Appellant's absence, was ever considred prior to the Agency's decision to terminate Appellant. Please state all such acts of duress or coercion of which the agency or its employees are aware.

86. Were the merits of Appellant's case ever considered individually, rather than in connection with the Professional Air Traffic Controller's Organization as a group?

87. What percentage of air traffic controllers who are not administrative,

management, maintenance and/or instructional reached retirement?

88. What notices, if any, were provided as to deadlines or times to return to dauy?

89. Were telephone calls made to the Appellant to return to work?

Provide all oral hearing memranda, notes and recommendations and summaries if any such exist.

90. Did the deciding official in the Appellant's case make any statement to the press or anyone stating that he would not decide against removal for controllers?

91. Did the Oral Presentation officer have the authority to reverse the firing announced by the President in the Rose Garden on Augut 3, 1981?

a. If so, did any of the oral presentation officers nationwide do so?

b. If so, state who, where and present a narrative of the facts in such case or cases.

92. Did the Deciding official have the authority to reverse the firing announced by the President in the Rose Garden on August 3, 1981?

a. If so, did any of the deciding officials nationwide do so?

b. If so, state who, where and present a narrative of the facts in such case or cases.

93. Were guidelines, circumstances or conditions issued by the Federal Aviation Administration for grounds by which the Appellant could reverse the proposed firing?

a. If so, what were they?

b. Who was advised of such guidelines, circumstances of conditions?

c. Was the Hearing Official avised?

d. Was the Deciding Official advised?

e. Was the Appellant advised?

94. Identify the location of Appellant's personnel file on the date of the oral presentation, the date of the deciding official's decision to remove, and the date of your answer.

95. Was the Federal Aviation Administration planning a reduction in force of air traffic controllers?

96. Identify each and every study, report, memorandum, note or writing in which a reduction in force is discussed or advocated and supply us with a copy.

97. For how many air traffic controllers was the Federal Aviation Administration budgeted in 1981-82?

98. For each change in procedures on handling air traffic which occurred after August 3, 1981, explain why it was not done earlier.

99. Supply the name, address, phone number and job description of each Federal Aviation Administration employee at Appellant's facility who was disciplined, reprimanded, suspended, fired or who otherwise had an adverse personnel action in 1970 (the year of a similar occurrence).

100. Supply the name, address, phone number and job description of each Federal Aviation Administration employee at Appellant's facility who was disciplined, reprimanded, suspended, fired or who otherwise had an adverse personnel action in 1971-1981.

101. Has the Federal Aviation

Administration or any official thereof directed or suggested to Federal Aviation Administration employees that they make no statements for or in favor of the Appellant? If so, identify each and, if in writing, attach a copy.

102. Identify by name, address and phone number each air traffic controller who was not working on August 3, 1981, and later returned to work at the same facility at which Appellant was employed. Explain the dates such air traffic controller was not working, the reasons therefor, and the dates and circumstances of his return.

103. Were air traffic controllers who were not working on August 3, 1981, and subsequently returned, required to sign or volunteered to sign any document regarding striking or their reasons for absence.

Identify and attach each such document at Appellant's facility.

104. How much time did the deciding official take in reviewing the Appellant's case in making his decision.

105. How much time did the hearing official take in the hearing?

106. Please provide the duty roster and time logs for the deciding official, hearing official and all management personnel for the months of August and September.

107. Did Appellant's hearing official consult with any person before answering Appellant's questions? If so, state all such persons and the substance of the consultation.

108. On what date was the "Notice of proposed removal" typed? On what date was the said noticed signed?

109. On what date was the "Notice of Removal" typed? On what date was the said notice signed?

110. State the names, addresses and phone numbers of all Federal Aviation Administration employees at Appellant's facility who were hired, rehired or otherwise placed as air traffic controllers on or after August 3, 1981.

111. a. Were all of tnese employees medically, emotionally ad physically qualified?

b. Were any of these employees previously identified as not medically, emotionally or physically qualified?

112. Did the hearing official refuse to supply information or authority for his actions except to rely upon U.S. Code 1918 and 7311?

a. If not, supply all such information.

b. If so, explain why.

Did the hearing or deciding officials agree to make available any additional evidence beyond that shown at the oral hearing?

113. Have any documents relevant to this matter been removed, lost, destroyed or altered? If so, state for each, when and by whom.

114. Was union representation afforded, allowed and offered Appellant at all briefings by Federal Aviation Administration management?

115. How did the notices, leave schedule and other preparations for the June anticipated events differ from those for the August events?

116. Were the locks to the facility the normal methods of entry to the facility altered after August 3, 1981? If so, when and by whom.

117. Name all persons who had input into the decision in Appellant's firing.

118. Please supply a copy of all "unsafe Condition Reports" and records of Facility Technical Advisory Committee meetings for the last two years for Appellant's facility.

119. Was any air traffic controller fired in August or September 1981 and then later returned to work? If so, state the name and details of each such incident.

120. What procedures, sections, provisions or rights of the negotiated Agreement of PATCO applied to any, each and all stages of the events leading up to and including the firing of the Appellant. State each such procedure, section, provision or right which was conformed to by the Agency and each which the Agency violated.

121. Please list or explain, in narrative form the Agency's reasons for alleging that the Appellant took part in strike activity in this instance. If Appellant was observed participating in alleged strike activity, please list along with your answer, the names and addresses of all such observers. If your answer is predicated upon non-attendance from

employment, please list the dates and time of said alleged non-attendance and attach log sheet(s) or other evidence which would substantiate said non-attendance.

122. a. Did the Agency ever attempt to make or infer a distinction between absence from employment during duty hours due to strike activity and absence from employment during duty hours for any other reason, e.g. leave status, AWOL, etc.?

b. If your answer to the above Interrogatory is in the affirmative, how did the Agency distinguish controllers who were absent from duty due to alleged strike activity from controllers who were absent from duty without leave or authority on the

part of the Agency but without actually taking part in the strike?

COOPER & COHEN

By: /S/
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By: /S/
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3536a

APPENDIX 4:

Order ALJ-3

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CERTAIN FORMER AIR TRAFFIC CONTROLLERS, Appellants	)	
v.	)	Discovery No: ALJ-3
FEDERAL AVIATION ADMINISTRATION, Respondent	)	

ORDER

Stephen C. Cooper and Steven Z. Cohen, counsel for former air traffic controllers whose appeals are pending in several of the Board's Regional Offices have filed separate motions to compel answer by FAA to interrogatories on behalf of certain individual appellants. The FAA has responded with objections to certain questions. The sets of interogatories, which consist of a maximum of 122 separately numbered questions, present

identical questions in each set, through some sets do not contain as many of the questions as do others. However, many questions are repeated within a single set of interrogatories. A comparison of the motions filed in the Regional Offices also reveals that in some instances the order in which the same questions are stated varies from one region to another. This makes it unnecessarily burdensome for the Board to consider and for the respondent to answer each set of interrogatories separately.

There is attached a set of interrogatories 1/ which are illustrative of those filed on behalf of all appellants. Since the attached set of

1/ Filed on behalf of Joseph D. Badami, Chicago ARTCC.

interrogatories cover the information sought by all the appellants on whose behalf counsel filed motions and in order to facilitate the preparation of responses to the interrogatories, this order is made applicable to all such motions to compel answers to interrogatories filed by counsel, Cooper and Cohen, In their orders, the presiding officials will identify the specific motion or requests to which this Order applies. The answers of FAA to the Badami interrogatories may be used in responding to the questions propounded under the other motions. Upon consideration of the pleadings, the motions are GRANTED in part and DENIED in part.

A. The FAA is ORDERED to respond separately for each appellant to questions 1, 4, 7, 10, 13, 15,

16, a and b, 21, 36, 45, 54, 55, 56, 65, 72, 73, 74, 75, 77a-b, 78, 80, 83, 85, 86, 89, 90, 91,*92, *113, and 121 which seek relevant information.
(* not a and b)

B. The motion is DENIED as to:
(a) questions 2, 3, 8, 11, 12, 14, 16 c and d, 17, 20, 22, 23, 24, 25, 26, 27, 30, 31, 32, 37 41, 44, 46, 47, 48, 52, 53, 57, 59, 62, 63, 69, 70, 81d, 82, 84, 87, 95, 96, 97, 98, 103, 104, 105, 106, 108, 109, 110, 111, 114, 115, 116 and 118 since there has been no showing of relevancy;

(2) questions 9, 38 40, 99, and 100 since they are overly broad and burdensome;

(3) questions 6, 16e, 18, 28, 29, 33, 34, 35, 42, 58, 60, 61, 76, 88, 91 a & b, 92 a&b, 93, 101, 102, 119, 120, and 122 since, to the extent they seek relevant information, it will substantially be produced pursuant to General Discovery Order ALJ-1 of April 7, 1982, ALJ-2 of April 15, 1982 and the witness list and statement of facts and issues to be exchanged upon ORDER of the Regional Offices. Additionally, the parties are ORDERED to exchange exhibits to be used at hearing and not of record ten days prior to the hearing unless otherwise directed by the presiding official;

(4) questions 64, 66, 67, 68, 71, 70, and 81a-c since the information sought is within the movants' knowledge or is already in the record;

(5) questions 5, 19, 39, 50 and 77c since they ask for legal conclusions; and

(6) questions 43, 49, 51, 94, 107, 112, and 117 since they seek information which will be disclosed pursuant to rulings on other questions.

The presiding official is authorized to set the time for response and to sign and serve on my behalf such orders as are necessary to effectuate this ruling.

Dated: May 26, 1982

/s/
John J. McCarthy
Chief Administrative
Law Judge

3538a

APPENDIX 5:

Motion for Production of Documents

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO FIELD OFFICE

In the Matter of:

STEVEN W. CONAWAY,

Appellant,

vs.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,

Agency.
_____/

MOTION FOR PRODUCTION OF DOCUMENTS

NOW COMES the Appellant, by and through his attorneys, COOPER & COHEN by STEVEN Z. COHEN, pursuant to 5 C.F.R. §1201.81, and for his Motion for Production of Documents pursuant to Subpoena states as follows:

1. Appellant filed his claim of appeal before the Merits Systems Protection Board pursuant to his rights under 5 C.F.R. §1201, et seq.

2. Within his claim of appeal, it is necessary for him to prepare his case and sustain his burden of proof before the Merit Systems Protection Board.

3. In order to sustain said burden, it will be necessary for Appellant to discover certain documents thereof that are in the possession of the Federal Aviation Administration.

4. A complete list of the documents requested is attached hereto and incorporated by reference as though set forth in full.

5. 5 C.F.R. §1201.81 provides for the production of documents pursuant to subpoenas issued by the Merit Systems Protection Board.

WHEREFORE, Appellant prays this Honorable Board grant his Motion for

Production of Documents and order said documents to be produced for copying at the offices of Appellant's attorney forthwith so that this matter may proceed and the Board may be fully advised in the premises.

COOPER & COHEN

/S/

STEVEN Z. COHEN (29344)
Attorney for Appellant
3000 Town Center, Suite 909
Southfield, Michigan 48075
352-8090

3539a

LIST OF DOCUMENTS

A. Transcripts of any and all speeches, statements and press releases made by officials of the U.S. Government as relates to the so-called strike of August 3, 1981.

B. Any and all directives and orders of any kind issued by officials of the Agency as relates to handling of firings and Merit Systems Protection Board hearings of Air Traffic Controllers.

C. Transcript of appearance of Drew Lewis on "Face the Nation" and on or at any other show, meeting, speech, or interview.

D. Details of all adverse personnel action proposals and final decisions by the Federal Aviation Administration since January 1, 1981 to the present and the sanctions or remedy imposed.

E. Any and all memoranda, notes, research, discussions and records relating to possible criminal action against Air Traffic Controllers within the meaning of 5 U.S.C. §7511.

F. Any and all research and studies of the health and safety of Air Traffic Controllers and their jobs.

G. Details of any and all devices and/or equipment which have been considered by or suggested to the Agency over the last five (5) years for use by Air Treaffic Controllers with details as to how such device or equipment would or could affect the Air Traffic Controller or his job safety and health.

H. For each and every regulation, order, directive or rule relating to the performance of the Air Traffic Controller's

job, which has been supplemented, changed or modified since August 1, 1981. Supply both the new regulation and the one it modified, supplemented or changed.

I. Supply copies of all writings in your files relating to stress of Air Traffic Controllers.

J. Please supply copies of any and all writings tending to show that part or all of the Air Traffic Controller's job was harmful to his health or safety or both.

K. Supply copies of any and all statements made by any party or agent of a party or witness or potential witness in this act which concerns this case.

L. Supply copies of any and all evidence, records, testimony, photographs or other exhibits you intend to produce at the hearing on this matter.

M. Supply the personnel files of the deciding officer and hearing officer and copies of any and all complaints ever made against either such official.

N. Supply copies of all directives, orders and rules supplied to the deciding officer and hearing officer as relates to the nadling of all personnel actions in June, July, August, September, October and November, 1981 and January and December, 1970.

O. Supply copies of any and all decisions of the Federal Aviation Administration and Merit Systems Protection Board (or its predecessor) as it relates to Federal Aviation Administration employees charged with AWOL or striking fom 1968 to date.

P. Supply each and every memorandum

or other writing requested in the Interrogatories in this case.

Q. For any document requested herein which you do not produce, describe with specificity why you cannot comply.

R. Supply the complete personnel file of Appellant.

S. Any and all copies of performance appraisals of Appellant.

T. The complete job description of the Appellant's position.

3539a

APPENDIX 6:

Order on Motion for Discovery and Enjoining, Restraining and Staying Destruction of Documents

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

IN THE MATTER OF:	)
	)
Former Air Traffic Controllers (See Attached List)	)
	)
v	)
	)
Department of Transportation Federal Aviation Administration	)
	)

ORDER ON MOTION FOR DISCOVERY AND ENJOINING, RESTRAINING AND STAYING DESTRUCTION OF DOCUMENTS

The appellants have timely filed or renewed previously filed Motions for Discovery and to Enjoin, Restrain and Stay Destruction of Documents and for oral argument thereon.

The appellants' motions and the agency's objections have been considered and the following rulings are made:

(a) The requests for documents

identified in A, B, and C, are responded to in the General Discovery Order ALJ-1 issued by the Board on April 7, 1982 and no further ruling is necessary;

(b) The requests for documents identified in D are substantially covered by the General Discovery Order ALJ-1, April 7, 1982, and that portion of D not covered by that order is denied as not relevant to the instant appeals;

(c) the requests for documents identified in E are denied as too broad, and to order their production would be a violation of the attorney work product and the attorney-client privilege;

(d) the requests for documents identified in F, G, H, I, and J are denied as not relevant to the instant appeals;

(e) the requests for documents identified in K are denied as too broad;

(f) the requests for documents identified in L are denied as premature, as a schedule for the exchange of these documents will be set at the time the hearings are scheduled;

(g) the requests for documents identified in M are denied as not relevant to the instant appeals;

(h) the requests for documents identified in N are responded to in General Discovery Order ALJ-1, April 7, 1982 and no further ruling is necessary;

(i) the requests for documents identified in O are denied as too broad and because at least half of the documents requested are a matter of public record;

(j) the requests for documents identified in P and Q are granted;

(k) the requests for documents identified in R are covered by the General Discovery Order ALJ-1, April 7, 1982 and no further ruling is necessary;

(l) the agency is ordered to produce for each appellant covered by this order the documents requested which are identified in S and T, unless those documents are contained in the appellants' personnel files, in which case production is covered by the General Discovery Order ALJ-1, April 7, 1982.

Production in accordance with this order is to be completed by July 16, 1982.

The appellants' Motion to Enjoin, Restrain and Stay Destruction of Documents is denied.

The appellant's Motions for Oral Argument with respect to these motions is denied.

SO ORDERED:

Date: June 18, 1982

/S/
Julia P. Grip
Presiding
Official

3540a

APPENDIX 7:

Order on Requests for Witnesses

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

IN THE MATTER OF:)
)
Michael L. Burye, et al-DET)
)
v.)
)
Department of Transportation)
Federal Aviation Administration)
)

ORDER ON REQUESTS FOR WITNESSES

Upon consideration fo the parties' requests for witnesses, and objections made therto, the following ruling is made:

The agency has requested the appearance of the individual appellants as witnesses in its case-in-chief. Over the appellants' objections, it is ordered that the appellants covered by this order appear at the hearing to give testimony in the agency's case-in-chief. Failure of an appellant to appear and testify may result

in the imposition of sanctions under 5 C.R.F. 1201.43. The appellants will be open to examination by all parties.

The agency will also be allowed to call Messrs. Robert Shipp, Kenneth Melotte, Charles Walton, Michael L. Shite, and U. S. Marshal Witz.

Appellants Burye and Hice may call and the agency is ordered to produce the following witnesses: Messrs. Shipp, Melotte and Ms. Olga Krynski. The appellants may also call Messrs. Elmer Beyer, Thomas Ottenbaker, and Karl Schafer; also Ms. Grace Hice and Ms. Karen Burye.

Mr. Kenneth Patterson is granted by way of deposition de bene esse.

These two appellants also requested numerous other witnesses who are denied them for the following reasons:

Lawrence M. Jones
Stephen H. Fuller
David G. Bowers

The appellants indicated that they would elicit testimony from these three individuals as to the causes and reasons for the strike and the hazardous, dangerous, and unsafe working conditions which existed at the facility. This testimony is considered to be irrelevant to the question of whether or not the appellants were on strike and immaterial to the question of whether or not the appellants were absent without leave.

Walter Mondale
J. Lynn Helms
Andrew Lewis
James A. Baker
William Ford
Edwin Meese III
Ronald Reagan
Langhorn Bond
Michael K. Deaver
Keith Burk

Wes Walker
E. V. Curran
R. J. Van Vuren
Richard Shewfelt

The appellants indicated thaty they would elicit testimony from these witnesses to the effect that the agency was planning a reduction-in-force and that this strike was fomented by the agency to avoid a reduction-in-force and thereby save the agency considerable funds. The appellants would also elicit testimony concerning the procedures used to teminate the appellants and to the dangerous and hazardous working conditions in existence at the facilities. As to the procedures used to terminate the appellants, these witnesses are not deemed to have any material knowledge which is not available from the witnesses already granted to the appellants. As to working conditions, as stated above the requested

testimony is irrelevant to the question of whether the appellants were on strike and immaterial to the question of whether the appellants were absent without leave. The question of whether the agency fomented a strike which was called by the Professional Air Traffic Controllers Organization (PATCO), at the national level, is immaterial to the question of whether these three appellants were on strike. See ALJ-1(c)(g)(1), August 16, 1982.

Janice Plummer

The appellants indicate that she was a fired air traffic controller who was returned to work in a settlement agreement with the agency. They indicate that her testimony is necessary to establish their argument of unequal protection of law. As indicated in ALJ-1(c)(g)(1) (August 16,

1982), "(t)here are many speculative reasons why the FAA may have decided to reinstate or rehire a former controller rather than contest that particular controller's appeal before the Board. As succinctly explained in ALJ-1(C)(g), the FAA's reconsidered decisions to rehire or reinstate former controllers would have no relevance to the merits of the original decisions to remove those controllers." The testimony of this witness is deemed to be irrelevant to the issues of this appeal.

Clifton F. Von Kann
Robert Whittaker
Glenn M. Anderson
Charles F. Ehret
Berry Beeder
Bruce Danto
Emanuel Tanay
Ralph A. Amato
Dr. Glenn C. Kinney
Dr. Mark J. Spahn
Michael W. Hurst, Ed.D.
C. David Jenkins Ph.D.
Robert M. Rose, M.D.
John J. Corson

Mr. Peter W. Bernhard
Dr. Allern D. Catterson
Dr. Robben W. Fleming
Mr. Arthur D. Lewis
Mr. James M. Mitchell
Mr. Stanley H. Ruttenberg
Leland J. Eck
Gerald M. Boprie
Gerald Heffner
Norman T. Lang
Kerry G. Matthews
Michael J. Mitchell
F. Lee Bailey
William Ford (previously denied)
Dr. Brattin

The appellants indicate that they will elicit testimony from thes witnesses to show the hazardous, dangerous, and unsafe working conditions which the air traffic controller profession is subjected to and the specific conditions which existed at the Detroit City facility. They would also testify to the stress resulting from those conditions. As stated above, this testimony is deemed to be irrelevant to the question of whether or not the appellants

were on strike and immaterial to whether or not they were absent without leave.

Former Assistant U. S. Attorney

The appellants indicate that they will elicit testimony about statements made in open Court in front of Judge Cohen of the United States District Court concerning an order to all controllers to return to work. The appellants are advised to submit the transcript of the Court proceedings. The witness is denied.

Suzanne Holloway

This witness is denied because it is apparent that she does not have any knowledge of facts material to this appeal.

The request for "all dismissed controllers", "all FAA personnel employed at the facility", and "all maintenance technicians" is denied as too broad.

Wayne Barlow
Johhn Robinson
Phillip Davenport
Richard Griffith
Charlie Walton
Mike White
Wanda Cooper
Barbara Martin
Jack Caldrone
Debbie Zielinski

These witnesses are denied as repetitive of those already granted or ordered to appear.

The remaining appellants did not submit a request for any witnesses.

SO ORDERED:

Date: September 27, 1982

/S/
Julia P. Grip
Presiding
Official

3541a

APPENDIX 8:

Appellants' Regional Interrogatories

UNITES STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

In the Matter of:

FORMER AIR TRAFFIC CONTROLLERS
represented by COOPER & COHEN, P.C.,
3000 Town Center, Suite 1150,
Southfield, Michigan 48075,

vs

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION
_____/

APPELLANTS'REGIONAL INTERROGATORIES

NOW COME the Appellants, by and through their attorneys, COOPER & COHEN, P.C., and for Regional Interrogatories, as ordered by Presiding Official Stephen Manrose, propound the following questions to be answered by the Agency separately and in writing, under oath, within twenty (20) days of receipt thereof. All interrogatories are continuing in nature.

1. Set forth in detail the current

air traffic controller work force, including supervisory personnel, in the Great Lakes Region.

2. Set forth in detail the work force of non-supervisory air traffic control personnel in the region immediately prior to August 3rd, 1981.

3. Set forth in detail any regional notices issued regarding policies, practices, procedures and guidelines for discharging controllers in 1981.

a. Produce said regional notices.

4. Identify and set forth in detail the general notices received by the facilities in this region regarding Freedom of Information Act requests filed by controllers charged with alleged striking.

5. Identify by name and title all FAA personnel who participated, in any manner,

in the decision to discharge (and the actual discharges) of controllers for alleged strike activity.

a. What specific input or action did each of these individuals undertake?

6. With regard to any adverse action taken against the controllers, did the national office give certain instructions to be implemented at the regional level?

a. Did the instructions come from the regional offices?

b. Set forth those instructions in detail.

7. Please state with specificity the names of the facility chief or deciding officials responsible for any plans for disciplinary action with regard to job actions, alleged strikes, slow-downs, sick-outs, etc.

a. How many people from this region were involved?

b. Which office of the FAA national level was directing the disciplinary action?

8. Identify, summarize and produce all documents setting forth all administrative contingency plans for use on a national basis.

9. Set forth in detail the normal policy effective August 3rd, 1981, for cancellation of leave as stated in the handbook.

a. What are permissible reasons for cancelling leave?

b. Must the reasons be in writing or may they be oral?

10. What level of absenteeism would constitute an operational emergency?

a. Is this determination contained within a written policy? Identify, summarize and produce all such doceuments.

b. State the level on a national basis.

c. State the level for the Chicago Regional facilities.

d. Who is the appropriate authority to make the determination of whether an operational emergency exists?

11. Set forth in detail the specific method of plan used in sending telegrams to the controllers who missed their first scheduled shift after August 3rd, 1981.

a. Produce all records showing the final date on which the telegrams, which were to be sent to the controllers, had in fact all been sent out.

b. Produce the documented proof that all of said telegrams had in fact been received.

12. Set forth the manner in which GENOT 127 was implemented. Specifically, state the method by which the FAA notified controllers who were not at work on August 3rd, 1981, of the information contained in GENOT 127 - i.e., of the President's statement regarding the 48-hour deadline in this region?

a. Produce any document showing the method of notification.

b. Produce any written notification used.

13. Set forth in detail the efforts made to notify the controllers who were not at work on August 3rd, 1981, that if they reported to work by the first shift after

11:00 a.m., Wednesday, August 5th, that they would be allowed to report to work.

14. Set forth in detail the names of people in the regional office who received calls from controllers regarding as to the implementation of the 48-hour deadline.

15. How many controllers in the Chicagto Region came back to work before the 48-hour deadline?

a. What are the names of said controllers.

16. Was any adverse action proposed against any alleged strikers who returned under the President's 48-hour deadline. If yes, what adverse action was contemplated?

17. Set forth in detail any adverse action taken at an individual facility level which was inconsistent with the national policy regarding controllers who returned to work.

18. Set forth in detail the names of any returning controllers in this region who were disciplined.

19. Set forth in detail the names of controllers who missed tne 48-hour deadline and were allowed to return to work.

20. Other than GENOT 147, identify and set forth in detail tne contents of any other policy utilized by the FAA in this region regarding designation of oral reply officers.

a. How were such designations made?

b. What criterion was used to determine the qualifications of oral reply officials.

c. Who made these selections?

21. State the level of participation and involvement at the regional level of

the decision to use the seven-day notice provision.

22. Identify, summarize and produce all GENOTS which contain instructions that the region received regarding the procedure that were to be followed by the oral reply officials and the deciding officials.

23. Were deciding officials or reply officials allowed to consider the potential for rehabilitation of a particular individual. Identify and set forth in detail the contents of any document addressing this subject.

24. State in detail the names of any members of your staff presently at the FAA regional office who participated in the 1970 job action. Are any of them supervisors or other members of management? If yes, state their names.

25. Are there any specific policies, guidelines written directives or other orders, either written or oral, that prohibit the hiring of controllers appealing their removals? If yes, identify, summarize and produce them.

26. State in detail the Agency's poisition regarding controllers who returned to work before the deadline. Did the Agency consider these controllers to have been on strike?

27. Identify and set forth in detail the substance of any and all directives given to the Chicago Region facility chiefs other than the GENOTS regarding the manner in which controllers would be allowed to return to work prior to August 5th.

28. Did anyone from the FAA regional office have contact with the U.S.

Attorney's office regarding possible prosecution of or amnesty for absent controllers? If yes, state the date, time and place of such contact, the FAA personnel having such contact and the substance of such conversations.

29. In order to return to work at any time, either prior to the deadline or subsequent, were air traffic controllers required to sign a statement admitting their participation in the alleged strike?

30. Were the air traffic controllers forced or requested to sign any other documentation? If yes, identify such documentation.

31. How many directives regarding the handling of absent controllers were sent to FAA regional offices between August 3 and the six months after the alleged strike.

Identify and summarize each such directive.

32. Were any directives or other documents sent to tower chiefs or center chiefs giving specific instructions regarding the removal cases?

33. List any instructions given to the hearing officials that were not in writing and have not been produced so far by the Agency regarding how removal cases were to be handled and/or decided.

34. Identify by name and title any and all FAA officials who issued any such instructions.

35. With regard to hearing officials having to be employees of the FAA and GENOTS indicating guidelines to be followed, if the guidelines were not followed, was that person removed as a hearing invalid?

36. State with specificity the procedure used to cancel annual leaves.

37. State with specificity the instructions given to facility chiefs as to how annual leaves were to be cancelled.

a. Who gave those instructions.

b. Were these instructions followed to the letter in every case?

38. Is there an Agency procedure or policy that states the preferred way for annual leave to be cancelled?

a. Produce a copy of said procedure or policy.

39. With regard to terminating the controllers who participated in the alleged strike, was there a national or regional policy to give any leniency or considerations of leniency to any controllers?

a. Did there exist any policy, guideline or directive which prohibited any punishment other than termination? If yes, identify and set forth in detail the contents of any such directive, guideline or policy, including the person who issued it.

40. Are there any rules, regulations or procedures with regard to what has to be included in a notice of removal?

41. State with specificity any and all guidelines as to the discretion and/or latitude oral reply officials had with regard to adverse action.

42. Were special intake telephones set up in any of the facilities to receive telephone calls from the controllers who wanted to come back to work?

a. What other actions were taken

to receive communications from controllers about returning to work?

43. With regard to the "proposed notice" given to certain controllers, were hearing officers instructed to ask controllers about confusion with regard to the letter?

a. How were they so instructed?

44. Are the computers utilized in the towers outdated for use by air traffic controllers? Please state, for each facility, how often computers have been repaired and/or have broken down, and the length of time between repairs. Are the computers the newest available, given the "state of the art"? If not, explain why the computers have not been updated.

45. Did there exist any guidelines, instructions or procedures regarding the

discharge of controllers who cited unsafe conditions or safety conditions at the job sites?

a. If so, identify and set forth in detail the substance of such documents.

46. Were there any policies, guidelines or instructions with regard to discharging controllers that mentioned safety conditions or the unsafe working conditions under which the controllers might have been working?

47. State the name of the person in charge of safety at each facility and for the region.

48. Identify all grievances filed regarding facility and controller safety.

49. Has the Agency issued guidelines as to the definition of harmful error in terms of procedures followed in the

discharges? If so, set forth these guidelines.

50. To your knowledge, does the Agency have a policy as to whether mitigating circumstances including (but not limited to) unusual job tensions, personality problems, mental impairment, harassment or bad faith, malice or provocation on the part of others involved in the matter should have been considered in determining any adverse action to be taken.

51. State with specificity the methods used to select the hearing officials.

52. What training (if any) was given to these hearing officers prior to the time they assumed their duties?

53. Did the hearing officers have any experience in personnel matters or specific knowledge of the regulations?

54. Was there any communication in the way of conversations, etc., between tne region and the facility chief with respect to cases or how to decide them?

55. State with specificity the factors an individual deciding official could rely on in determining whether an individual controller should be returned to duty.

a. If such factors are set forth in writing in a directive, guideline or regulation, identify such document.

56. State whether or not regulations exist as to the procedure for cancellation of annual leave.

a. Identify and summarize the substance of those regulations.

57. Set forth in detail any and all security plans relative to safety and measure to be taken.

58. Have facility chiefs ever declared emergencies at his or her facility? If yes, state the date and time, the facility, the facility chief and the nature of the emergency.

59. Please state in detail any and all procedures and/or practices governing the tendering and acceptance of resignations.

a. Have any controllers resigned in this region in the last ten years for health or safety related reasons? If yes, state (1) how many; (2) their names and facilities; (3) date reseigned; (4) length of service; (5) reason for resignation.

60. State the general policy of the FAA regarding the rehiring of an employee after he or she resigns.

61. Has the FAA ever rehired any such controllers? If yes, how many? State

their names, facilities and dates of resignation and rehire.

62. Has the FAA considered reinstatement of any controllers who engaged in alleged strike activity? If so, state the controllers involved, the reasons for such review and the action that might possibly be taken with respect to their potential reinstatement.

63. Is there a policy regarding back pay, seniority and/or placement for reinstated controllers? If yes, set it forth in detail.

64. Do you have any knowledge whether any controllers, trainees or developmentals were told that they would wash out of training if they did not participate in the job action? What communications or follow-ups did the facility chiefs used to

communicate to the developmental/trainee employee?

65. In your region were any individuals, any developmental trainee positions, people holding those positions, reinstated according to GENOT 141?

66. Did there exist any regional directives, instructions or procedures concerning the determination by the Agency whether an individual controller failed to report for work for reasons other than being on strike?

67. After the Presidential deadline of August 5th, but before the letter of intent to remove was sent out, were any regional directives issued by the Agency to be used in determining whether controllers had failed to report for work did so for reasons other than being on strike?

68. After the letter of intent to remove was sent out but before the oral hearing, were there any regional directives for the Agency to determine whether an individual controller failed to report for work for reasons other than being on strike?

69. Did any facility chiefs contact or have supervisors contact individuals to try, either by telephone or in person, to get them back to work?

a. Please state names of the chiefs and the individuals contacted.

b. Please state the method of contact.

70. What are the regulations in the Great Lakes Region concerning the cancellation of annual leave?

a. How did you implement these regulations?

b. How were the facility chiefs ordered to effectuate the cancellation of annual leave?

c. Were all controllers contacted that were on annual leave? Identify all the controllers contacted and all those not contacted.

71. Were telegrams sent to all air traffic controllers on annual leave advising them that their annual leave was cancelled effective August 3rd? When were they sent?

72. Are there any FAA regulations, guidelines or policies in the Great Lakes Region concerning who would be the proposing officer and the deciding officer in each removal action?

a. Were there any instances where the deciding and removing officers

were the same person? If so, for which controllers?

73. Set forth in detail the content of any communications, written or otherwise, that were sent to various towers and facility chiefs regarding media contact from August 1981 to the present?

74. How many controllers in the Great Lakes Region received favorable recommendations for return at the oral hearing?

a. State the names and facilities of said controllers, and the reasons for such favorable recommendations.

75. State the names and positions of all controllers on whom electronic/physical surveillance (wire-tapping/photographs) was conducted.

76. Supply any and all lists of names

which were submitted to the Department of Justice for prosecution, either prior to or subsequent to August 3rd, 1981.

a. How did the FAA determine which names to submit?

COOPER & COHEN, P.C.

/S/

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Dated: May 28, 1982

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APPENDIX 9:

Regional Discovery Order

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

IN THE MATTER OF:	)
	)
Former Air Traffic Controllers	)
	)
v.	)
	)
Department of Transportation Federal Aviation Administration	)

REGIONAL DISCOVERY ORDER

This order is for the purpose of ruling on proposed interrogatories which were timely submitted by four appellant representatives who actively participated at the regional air traffic controller appeal deposition which was held in Des Plaines, Illinois on May 6, 1982. Board guidelines for the submission and consideration of such interrogatories were set forth both in the transcript of the deposition and in a Regional Office order dated May 20, 1982. Only those

interrogatories which met these guidelines are herein forwarded to the Board's Administrative Law Judge for a ruling. The timetable for the agency's service of interrogatories which it is ordered to complete will be set forth in further Board orders. The agency need not serve the Board with copies of the completed interrogatories. It must, however, serve copies of its answers on all of the active participants in the regional discovery process, who are listed in the attached service sheet. Specific rulings on the proposed interrogatories are made as follows:

Appellant representatives Hafsten and Phillips each requested a total of four interrogatories. I am forwarding all of their interrogatories to the Board's Administrative Law Judge for a ruling.

Appellant representative Goldfarb of the Firm of Leighton, Conklin, Lemov, Jacobs and Buckley requested a total of five interrogatories. I will present interrogatories 4 and 5 to the Administrative Law Judge for a ruling. Interrogataory 1 is repetitious in view of the information supplied in ALJ-1 (as noted in the Judge's rulings in ALJ-3); interrogatory 2 relates to a facility, rather than to a regional, issue; and the information sought in interrogatory 3 was previously ruled on in ALJ-2.

Appellant representative Steven Z. Cohen of the law firm of Cooper and Cohen presented a total of 76 interrogatories, many of which were subdivided. Except where specifically noted below, these interrogatories will not be presented to

the Administrative Law Judge for a ruling. The reasons cited for failing to present pertinent interrogatories to the Administrative Law Judge is not necessarily exhaustive of those reasons which could have been cited; the reasons only constitute one or more bases for my rulings. The following rulings are made, referencing the specific numbers and subparts as designated by Cohen:

1. no showing of relevancy to regional discovery issues;

2. no showing of relevancy to regional discovery issues;

3. repetitious (renots produced);

4. repetitious (written documents provided as ordered in discovery); no showing of relevance to regional discovery issues;

5. repetitious (interrogatories ruled on in ALJ-3);

6., 6l, 6b no showing of relevancy to regional discovery issues insofar as the meaning of the question and its subparts can be discerned;

7., 7a repetitious (interrogatories ruled on in ALJ-3);

7b relevant to national, not regional, discovery issues;

8. no showing of relevancy to regional discovery issues; repetitive (administrative contingency plans produced at deposition); requests not in compliance with ruling made at deposition that no document requests would be entertained;

9., 9a, 9b repetitious (in view of documents produced under ALJ-1 and the rulings made in ALJ-3);

10, 10a, 10b, 10c, 10d no showing of relevancy to regional discovery issues (a portion deals with national discovery and other portions have been previously ruled on in ALJ-2 as irrelevant);

11., 11a, 11b no showing of relevancy to regional discovery issues; repetitious (interrogatories ruled on in ALJ-3);

12., 12a, 12b repetitious (responded to at deposition); request for documents in 12a and 12b not in accordance with Board order;

13. no showing of relevancy to regional discovery;

14. this interrogatory will be presented for a ruling;

15., 15a these questions will be presented for a ruling;

16. to the extent relevant to regional discovery issues, answered at deposition;

17. no showing of relevancy to regional discovery issues;

18. to the extent relevant to regional discovery and insofar as the meaning of the question can be discerned, answered at deposition;

19. repetitious (interrogatories ruled on in ALJ-3);

20., 20a, 20b, 20c repetitious (interrogatories ruled on in ALJ-3);

21. repetitious (see Goldfarb interrogatory #5);

22. repetitious (genots produced); improper request for documents;

23. repetitious (responded to at deposition and documents produced);

24. repetitious (responded to at deposition and in ALJ-3); no showing of relevancy to regional discovery issues;

25. no showing of relevancy to

regional discovery issues;

26. inquiry not relevant to regional discovery issues;

27. this interrogatory will be presented for a ruling;

28-30. repetitious (interrogatories ruled on in ALJ-3);

31. request national in scope; repetitious in that relevant documents/directives already produced;

32. repetitious (information adduced at deposition and in discovery documents);

33, 34. repetitious (information discovered at deposition; inquiries ruled on in ALJ-3);

35. the meaning of the question cannot be discerned;

36. repetitious (documents produced under ALJ-1; inquiry responded to in ALJ-3);

37., 37a repetitious (see Cohen

interrogatory #70);

37b relates to facility rather than regional issues;

38., 38a to the extent relevant, repetitious (see #36);

39. to the extent that the question is national in scope it is improper; to the extent that it is regional, it is repetitious (responded to in discovery documents and at deposition);

39a repetitious (interrogatories ruled on in ALJ-3);

40. repetitious (information referenced at deposition and in the documents produced under ALJ-1);

41. repetitious (interrogatories ruled on in ALJ-3);

42., 42a not regional discovery issues and, to the extent relevant, repetitious (information provided at deposition);

43., 43a repetitious (interrogatories ruled on in ALJ-3);

44. repetitious (see #45, 45a);

45., 45a repetitious ("safety" questions ruled on in ALJ-3 as not relevant. Pertinent documents made available under ALJ-1).

46. repetitious (see #45, 45a);

47. repetitious (interrogatories ruled on in ALJ-3);

48. repetitious (see #45, 45a);

49. this interrogatory will be presented for a ruling;

50. repetitious (information provided at the deposition and in the documents discovered under ALJ-1);

51-53. repetitious (interrogatories ruled on in ALJ-3);

54. repetitious (information provided at deposition);

55., 55a repetitious (information provided at the deposition and in discovery documents produced by the agency);

56., 56a repetitious (see Cohen interrogatory #70);

57. repetitious (interrogatories ruled on in ALJ-3);

58. the issue of "operational emergencies" has been ruled not relevant by ALJ-2;

59. 59a repetitious (interrogatories ruled on in ALJ-3);

60. repetitious (information provided at deposition);

61-63. no showing of relevancy to regional discovery issues;

64. no showing of relevancy to regional discovery issues;

65. does not comply with Board directive that only questions asked but not

answered at deposition can be presented;

66-68. repetitious (renots produced; covered at deposition);

69., 69a, 69b no showing that the proposed interrogatories are regional in scope;

70., 70a, 70b, 70c repetitious (interrogatories ruled on in ALJ-3);

71. repetitious (interrogatories ruled on in ALJ-3);

72., 72a repetitious (interrogatories ruled on in ALJ-3);

73. repetitious insofar as written communications are required; does not comply with Board order that only questions which were asked and not answered can be presented;

74., 74a to the extent relevant, repetitious in view of the information sought by interrogatories #1-4 as submitted

by Mr. Hafsten;

75. repetitious (responded to at deposition; specific information available at facility rather than regional level);

76. 76a repetitious (interrogatories ruled on in ALJ-3).

SO ORDERED:

Date: June 11, 1982

/S/
Stephen E. Manrose
Acting Regional Director

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